Supreme Court, U.S.
FILED
SEP 7 - 2004
OFFICE OF THE CLERK

No. 04 355

IN THE

SUPREME COURT OF THE UNITED STATES

EMERSON M.F., JOU, M.D.

PETITIONER

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,

RESPONDENTS

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Hawaii

PETITION FOR WRIT OF CERTIORARI

STEPHEN M. SHAW
P.O. BOX 2353
HONOLULU, HAWAII 96804
(808) 521-0800 (Telephone)
(808) 531-2129 (Facsimile)

Attorney for Petitioner
EMERSON M.F., JOU, M.D.

QUESTION PRESENTED FOR REVIEW

I. Whether a state agency's decision against Petitioner and in favor of an insurance company deprived Petitioner of his right to a fair hearing before an unbiased tribunal because one of the members of the agency's advisory panel, appointed to review the complaint against Petitioner, was paid-off by the insurance company?

II. Whether the state committed a regulatory taking by requiring extra-statutory licensing of physicians or their employees; and, whether the regulatory taking was *ad hoc* rule making without due process of law?

III. Whether singling out a board certified physiatrist for treatment disparate from other physicians who employ others incident to their services violates the equal protection clause?

IV. Whether the state judiciary violated Petitioner's Constitutional Rights to Due Process of law under the Fifth And Fourteenth Amendment?

PARTES TO THE PROCEEDING

All parties appear in the caption of this case, on the cover page. The Special Compensation Fund is not a party to this proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTES TO THE PROCEEDING i

TABLE OF AUTHORITIES . . . . . .vi-vii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1-2

STATEMENT OF THE CASE 3-10

ARGUMENT 10-22

I. THE STATE'S APPOINTMENT OF A MEDICAL PANELIST WHO HAD PREVIOUSLY BEEN PAID BY THE PARTY INSTITUTING THE ACTION DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS 10-18

II. ACTIONS BY HAWAII'S AGENCIES AND JUDICIARY VIOLATED THE FIFTH AND FOURTEENTH AMENDMENT 18-19

III. THE STATE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY LIMITING A PHYSICIAN'S SCOPE OF PRACTICE 20

IV. THE STATE VIOLATED THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY A REGULATORY TAKING UNDER PENNSYLVANIA COAL. 20-22

CONCLUSION 23

Appendix A – Hawaii Supreme Court Denial

Appendix B - Hawaii Intermediate Court of Appeals Decision

Appendix C – Agency Appeal Decision

Appendix D – Statutory Provisions Involved

TABLE OF AUTHORITIES

Page

Untied States Constitution

Fifth Amendment 1-2
Fourteenth Amendment 2

CASES

Aged Hawaiians v. HHC,
78 Haw. 192, 203, 891 P.2d 279 (1995) 9

Bateson v. Kentucky,
476 U.S. 79, 85-87, 100, 106 S.Ct. 1712 (1986) 13

Beauchamp v. De Abadia,
779 F.2d 773, 775 (1st Cir. 1985) 10

Bocalbos v. Kapiolani Med. Ctr.,
93 Haw. 116, 119 fn.12, 997 P.2d 42, 45 (App. 2000) 2

P.U.C. (California) v. United Sates,
355 U.S. 534, 540, 78 S.Ct. 446 (1958) 19

Carey v. Cvomo,
858 F.Supp.385, 387 (D.C. NY 1994) 17

Connally v. Georgia,
429 U.S. 245, 251, 97 S.Ct. 546 (1977) 14

Downtown Medical Center v. Bowen,
944 F.2d 756, 765-769 (10th Cir. 1991) 11

Gibson v. Berryhill,
411 U.S. 564, 578-79, S.Ct (1973) 14

TABLE OF AUTHORITIES

Page

CASES

Gray v. Mississippi,
481 U.S. 648, 668, 107 S.Ct. 2045 (1987). 15

Green v. Amesqua,
212 F.3d 358, 368 (7th Cir. 2000) 14

Greene v. McElroy,
360 U.S. 474, 492, 79 S.Ct. 1400 (1959). 18

Hughes v. Long,
242 F.3d 121, 130 (3d Cir. 2001) 17

In Re Murchision,
349 U.S. 133, 75 S.Ct. 623 (1955) 14

Jenkins v. Sterlacci,
270 U.S. App. D.C. 296, 849 F.2d 627, 632
(U.S. App. 1988) 15

Johnson v. United States,
520 U.S. 461, 468-69, 117 S.Ct. 1544 (1997) 13

Marshall v. Jerrico, Inc.,
446 U.S. 238, 242, 243, 247, 100 S.Ct. 1610 (1980) 14,15

Oestereich v. Selective Service Board,
393 U.S. 233, 242, 89 S.Ct. 414 (1968) 19

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393, 396-398, 43 S.Ct. 158 (1922) 9,20

CASES **Page**

Quillen v. Sec'y HHS,
793 F.2d 1293 (6th Cir. 1986) 15

Schneiden v. Chavez-Munoz,
9 Neb.App.579, 586, 616 N.W.2d 46, 53 (App. 2000) 2

Seibel v. City and County of Honolulu,
63 Haw. 516, 522, 631 P.2d 173 (1981) 16

Shelley v. Kraemer,
334 U.S. 1, 17, 68 S.Ct. 836 (1948) 10, 11,20,22

Syquia v. Board of Education,
80 N.Y.2d 531, 591 N.Y.S.2d 996,
606 N.E.2d 1387, 1390 (1992) 16,17

Truax v. Raich,
239 U.S. 33, 41, 36 S.Ct. 7 (1915) 11,18

Tumey v. Ohio,
273 U.S. 510, 513, 47 S.Ct. 437 (1927) 13,14
. . .
United States v. Cotton,
535 U.S. 625, 631, 122 S.Ct. 1781 (2002) 13

U.S. v. Sartori,
560 F.Supp. 427, 431 (D.C. Md. 1983) 15

Vasquez v. Hillary,
474 U.S. 254, 263-64 106 S.Ct. 617 (1986) 13

Village of Willowbrook v. Olech,
528 U.S. 562, 564, 120 S.Ct. 1073 (2000) 20

STATUTES AND RULES

United States Code Tile 28
Section 1257(a). 1

Supreme Court Rule 10(b) 1

Federal Rules of Evidence 706 18

Code of Federal Regulations (CFR) . . . . . .Appendix

Hawaii Revised Statues

HRS §382-1 19
HRS §386-27(c) 13
HRS §452 19
HRS §453-1 19
HRS §386-27(d) 6,12
HRS §453-1 18,19,22

Hawaii Administrative Rule
HAR §12-13-20 6
HAR §12-13-20(a) 11
HAR §12-13-20 (C) 15
HAR §12-13-20(e) 12
HAR §12-13-21 15
HAR §12-13-21(a) 12
HAR §12-13-21(d) 12
HAR §12-13-22 17
HAR §12-13-31 22
HAR §12-13-31 (a) 19

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the decisions below:

The Order Denying Application For Writ Of Certiorari, by the Supreme Court of The State Of Hawaii appears at Appendix "A" to this Petition and is unpublished.

The Summary Disposition Order of the Hawaii Intermediate Court of Appeals, appears at Appendix "B" to this Petition, and is unpublished.

The decision of the Labor And Industrial Relations Appeals Board, State of Hawaii appears at Appendix "C" to this Petition.

JURISDICTION

The date on which the Supreme Court of The State of Hawaii denied certiorari in this case was June 10, 2004. Appen "A". No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 §1257(a), or Rule 10(b) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V [1791]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE XIV. - 1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any Sate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Other Provisions Appended Hereto

A. Medicare B. News
B. Code Of Federal Regulations 42 CFR 410.60
C. Medicare Fee Schedule, And Other Excerpts Of The State of Hawaii. Title 12, Hawaii Administrative Rules
D. Hawaii Revised Statutes, Sections §386-27, §452-1, §453-1 and §461J-1

STATEMENT OF THE CASE

Petitioner, Emerson M.F. Jou, M.D. is a physician in private practice in Honolulu, Hawaii. He is board certified in physiatry. Schneiden v. Chavez-Munoz, 9 Neb.App.579, 586, 616 N.W.2d 46, 53 (App. 2000); Bocalbos v. Kapiolani Med. Ctr., 93 Haw. 116, 119 fn.12, 997 P.2d 42, 45 (App. 2000).

Respondent First Insurance Company of Hawaii Ltd (FICOH) is an insurance company selling worker's compensation, automobile and other property and casualty (P&C) insurance. In 2002, Hawaii P&C insurer's premiums, other than for life and annuity policies, totaled $1,796,690,502.00, while their claims benefits were only $708,842,399.00. Report of The Insurance Commissioner of Hawaii 2003 ("Cmr. Rpt") at 45. FICOH's 2002 Hawaii premiums were $72,328,085.00 against claims benefits paid of only $25,057,890.00. Id at 19.

The nearly 1.8 billion in premium charged by these insurers for insurance which includes health coverage overlaps with another $2.1 billion Hawaii residents paid to their HMOs and mutual benefit societies for health insurance. Id at 47. Added to this $3.9 billion burden on +1.2 million Hawaii residents, is another ±1.5 billion for life insurance and annuity premiums.

The Special Compensation Fund (SPF) took no part in the appeals below to the ICA or Hawaii Supreme Court.

Between August 31, 1987, and July 27, 1990, Petitioner provided services to an injured worker within

the scope of his board certification in physiatry. Appendix ("Appn") C.4 ¶ nos. 1-2.

On March 5, 1990, Respondent FICOH filed a complaint against Petitioner in the State Department of Labor And Industrial Relations (Appn. C.4) wherein was raised the propriety of Petitioner, Dr. Jou's billing reports, use of non-specific measures, prolonging passive therapy, and not referring the injured worker to a psychiatrist. Appn. C.4 ¶ no. 7, 8. To obtain a recommended disposition the state appointed an advisory panel of doctors. Members of this panel receive statutory immunity. They are to be paid by the state. Panelists were required to review the complaint, filed by Respondent before recommending a disposition of the case to the director of labor.

This appointment was over objection made by Petitioner's then counsel to the labor department. RA (record on appeal below) 218, 219. This objection was for bias and prejudgment (RA 218) and, most significantly the federal question of bias for pecuniary interest was raised. The panelist had already been paid handsomely for other work done avoiding Petitioner's medical benefit claim for an injured worker: "We could not get a fair hearing from him. He is already bought and paid for by one of the parties." RA 218. Emphasis added.

On July 20, 1990, after appointing the panel, the members, including FICOH's panelist, recommended that Petitioner be reprimanded. Appn. C.5, ¶ no. 9.

On August 21, 1990 Respondent insurer amended its complaint to challenge Petitioner's use of licensed massage therapists to perform modalities within the scope of licensure of physicians and LMTs in the state. These

procedures were incident to Petitioner's services as a physician, specializing in physiatry.

On November 21, 1990 the state labor director found for the insurance company (Respondent) and, inter alia imposed a $7,000.00 fine on Petitioner. Emerson M.F. Jou, M.D., appealed this decision to the Hawaii Labor And Industrial Relations Appeals Board (LIRAB).

On April 2, 1991 the LIRAB remanded the case back to the director to compute amounts which the LIRAB predetermined to be paid for modalities which were limited to licensed physical therapists and not physiatrists (M.D.'s), incident to their services. Appn C.7 no. 13.

On October 4, 1991, Petitioner's then counsel objected to the use of the bill coding service (AccuMed's report). Appn. C.8 no. 17. The director passed on the objection by admitting the report.

The AccuMed report was admitted against Petitioner, over objection, because the hearing officer decided "it is the basis for their request to have the amounts paid to Dr. Jou reimbursed." RA 858 (Exhibit Q to Respondent's First Supplement To Exhibit List).

On October 30, 1991 the state labor director made a supplemental decision against Petitioner, agreeing with the insurance company and ordering reimbursement. Appn. C.9 no. 18. Petitioner timely appealed. Id.

On August 8, 2001 the appeal was heard before the LIRAB (RA 1170). Therein, and by a post trial brief, Petitioner preserved federal questions: (1) "structural due process" violation, by using a paid-off state appointed

panelist to penalize Petitioner, RA 1173, (2) procedural due process violation by "pecuniary interest in the outcome" by a decision maker, RA 1173, (3) procedural due process violation by blocking cross examination and access to witnesses in agency, and on de-novo review, of billing evaluator (downcoder) to arbitrarily recode the billings based on the state's erroneous assumption that the billing done for Petitioner's services was outside the scope of his practice, and somehow not incident to his services as a physiatrist. RA 1175-1180 ("due process right to cross examine and confront witness" [RA 1176]).

The way in which these federal questions were passed on by the Hawaii Labor and Industrial Relations Appeals Board was by written Decision and Order filed on December 17, 2001, Appn. C. Curiously, the LIRAB thought that the panelist did not address Petitioner's reporting procedures, but conceded that Dr. Kam's opinion concluded that Dr. Jou prolonged physical therapy treatments and violated the law "by not following reporting requirements". Appn C. 6.

The LIRAB passed on the federal questions raised by Dr. Kam's pecuniary interest, almost in passing (Appn. C. 17 ¶ no. 3):

> "3. Pursuant to HRS §386-27(d) and §12-13-20, the Director has the discretion to convene an advisory panel if he determines that one is necessary. Our review of the record shows that the panel was convened in accordance with the statute and related administrative rules. Claimant has presented no evidence to show that the panel was improperly convened. Claimant's objection to

> First Insurance's choice of panelist is not a legal ground to bar the Director from convening an advisory panel." Appn. C.17.

The LIRAB passed on the federal questions raised by Petitioner over the misuse of AccuMed to down code his services, in cursory fashion.

> "36. Contrary to Dr. Jou's assertions, the Director's calculations in the October 30, 1991 supplemental decision were not based on the AccuMed report submitted by First Insurance. The Director's calculation of the amount of reimbursement differed from the AccuMed calculation.
>
> 37. Based on our review of the record, we find that the Director properly disallowed billings for treatments that were performed by individuals who were not licensed physical therapists".

On December 27, 2001 Petitioner timely appealed to the Hawaii appellate courts for review of the decision after trial de novo by the LIRAB. RA 1255-1276. On February 4, 2002 Petitioner filed a Request to Prepare Transcript on Appeal. RA 338. That transcript has yet to be filed by the Appeals Board clerk.

Nearly 3.5 years after noticing the appeal the Intermediate Court of Appeals, State of Hawaii (ICA) rendered its decision. Appn. B. The federal questions sought to be reviewed on certiorari to this Court were raised by the briefs on the merits. The federal questions

were passed on by the ICA in its unpublished summary disposition order filed May 7, 2004. Appn. B.

First, Petitioner, raised to the appellate court, the well preserved federal questions involved with the state's appointed panelists having been paid from two sources: the state fund; and, prior thereto by the insurance company, Respondent. The question was fully argued in Petitioner's brief on the merits ("Op. Br") 2, 18-25:

> ". . . a medical advisory board member who had been paid by the Appellee insurer to render an opinion against the Appellant prior to being accepted on the state panel is no different than a jurist with a financial interest in fines collected by his court . . . a due process violation even through the financial interest by Dr. Kam may be relatively small". Op. Br. 22. [Petitioner there cited the court to the Fifth and Fourteenth Amendment. Op. Br. 2].

The ICA passed on this federal question by saying "Dr. Kam was paid by the special compensation fund the same amount ($200) as the other panel members . . . " (Appn. B.6 ¶1) and "the advisory panel was just that, advisory". Id.

Second, Petitioner raised the federal question to the ICA of a regulatory taking, under the Fifth Amendment. His challenge earlier, in the LIRAB, clearly raised this question when that board upheld a coding scheme paying physicians less than physical therapists for the same services. Op. Br. 8: ("Dr. Jou believed that it was wrong to compensate a physical therapist more than a physician." Appn. C. ¶ No. 26. In his opening brief at 14 Petitioner informed:

"Taking's Clause Violation

The use by the Hawaii department of Labor of an administrative rule in conflict with the Hawaii Revised statutes, effected a taking of Dr. Jou's property without due process of law". This issue was raised below at R 1171.

The ICA passed on this question by saying (Appn B.7 ¶2): "Dr. Jou makes no detectable argument in support of this assertion, and thus fails in his burden on appeal to prove the administrative provisions unconstitutional . . . " Id.

Third, Petitioner raised the federal question that his right to equal protection under the Fourteenth Amendment had been violated when the state allowed the insurer's IME neurosurgeon (Kam) on its panel to challenge Petitioner's treatments. Op. Br. 2. The ICA did not pass on this question.

On June 1, 2004, Petitioner filed for discretionary review in the Hawaii Supreme Court. He raised federal questions therein which were not passed upon by that Court because it denied review. Appn. A. The federal questions raised were:

"A. Whether the State's conduct, approved by the ICA, penalizing the physician's practice and requiring additional licensure as a physical therapist is a regulatory taking, violating the Fifth Amendment And Fourteenth Amendments to The United States Constitution, and Article I Sections 4 and 5 of the Hawaii Constitution? Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414, 43 S.Ct 158 (1922); Aged Hawaiians v. HHC, 78 Haw. 192, 203, 891 P.2d 279 (1995).

B. Whether the ICA authorized the State, by its agency (LAB), to deprive Petitioner property without due process of law by permitting the use of a review board panelist who received payment prior to the proceedings for an IME on the same case? Beauchamp v. De Abadia, 779 F.2d 773, 775 (1st Cir. 1985).

. . . . . .

. . . . . .

E. Whether the ICA-approved conduct by the agency limiting the physician's scope of practice, and limiting the use of employees and products incident to the physician's services, constituted rule-making without due process, in violation of the 14th Amendment to The United States Constitution, and Article I Sections 4 and 5 of the Hawaii State Constitution?

F. Whether the ICA's endorsement of the agency's conduct restricting the property rights of Petitioner violated Petitioner's rights to equal protection under the Fourteenth Amendment to The United States Constitution? Shelley v. Kraemer, 334 U.S. 1, 17, 68 S.Ct. 836 (1948); and whether the ICA's decision singled Petitioner out for treatment disparate from other physicians who employ licensed non physicians incident to their services?"

ARGUMENT

I. THE STATE'S APPOINTMENT OF A MEDICAL PANELIST WHO HAD PREVIOUSLY BEEN PAID BY THE PARTY INSTITUTING THE ACTION DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

A. Background

After Respondent filed a complaint against Petitioner Emerson M.F. Jou, M.D., state agency rules allowed it to submit one proposed panelist to the director, together with two alternates. HAR §12-13-20(a). See page 4, supra.

Respondent's complaint against Dr. Jou centered on whether he was required to hire licensed physical therapists in his physical medicine and rehabilitation clinic. If so, the Respondent would have to pay very little for services already provided to individuals insured by Respondent.

Petitioner Jou's position remains that an administrative agency rule limiting services to licensed physical therapists could only rationally apply to LPTs in their own practice. This is consistent with the state's scope of licensure laws for physicians, as well as persuasive authorities which have dealt with LPTs in private practice. Downtown Medical Center v. Bowen, 944 F.2d 756, 765-769 (10th Cir. 1991).

Respondent insurance company has sought, and obtained, the state's assistance in avoiding payment for benefit claims for medical services rendered; and, for its part, the state of Hawaii through administrative and judicial action, has left its "clear and unmistakable imprimatur" on conduct depriving Petitioner of the right to work in the State of Hawaii. Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7 (1915); Shelley v. Kraemer, 334 U.S. 1, 18, 68 S.Ct. 836 (1948).

To help railroad Dr. Jou out of practice, the state's labor director convened a tribunal (including an "advisory" panel), which, through its corrupt practices infected the entire proceeding as it moved through the state agency, and the state appellate courts.

By statute, the panelist's fees "shall be paid for by the special compensation fund." HRS §386-27(d). Emphasis added. The amount was fixed by administrative rule at $200. HAR §386-27(d). Emphasis added.

Once appointed by the state labor director, members of the advisory panel were cloaked with judicial or quasi judicial immunity. HRS §386-27(d). The panel had subpoena powers. HAR §12-13-21(a). The advisory panel was specifically charged with reviewing the Respondent's complaint, with both the director and the Petitioner. HAR §§12-13-20(e); 12-13-21(a).

Further, the rules mandated that the advisory panel make a recommended disposition to the director of labor (HAR §12-13-21(a)); and that the recommended disposition be reviewed by the director before he holds a hearing. HAR §12-13-21(d).

The financially interested panelist, Dr. Kam, reviewed Respondent's complaint against Dr. Jou and incorporated thereto his own 33 page medical report which he had been paid previously by Respondent, to compile. RA 218, 219; 1171-1173, Op. Br. 19. But see Justice Lim's omission. Appn. B.6.

While the statute authorizing advisory panels required *sua sponte* recusal, Dr. Kam made no effort to raise thereunder any issue relating to his rewarding working

relationship with Respondent insurer. HRS §386-27(c). The insurer, the agency, and at least three state appellate justices thought Dr. Kam's retention as an arm of the director was just fine. Appn. B.

B. Dr. Kam's Presence On The Panel Was a Structural Due Process Violation

This Court has recognized that errors regarding the legitimacy of judges and jurors are structural. Tumey v. Ohio, 273 U.S. 510, 513, 47 S.Ct. 437 (1927); Bateson v. Kentucky, 476 U.S. 79, 85-87, 100, 106 S.Ct. 1712 (1986) (unlawful exclusion of jurors); Vasquez v. Hillary, 474 U.S. 254, 263-64 106 S.Ct. 617 (1986) (unlawful exclusion of grand jurors).

When error, as here is structural, prejudice below need not be proved. United States v. Cotton, 535 U.S. 625, 631, 122 S.Ct. 1781 (2002); Johnson v. United States, 520 U.S. 461, 468-69, 117 S.Ct. 1544 (1997).

Using a medical panelist with a pecuniary interest in the case to recommend a disposition and review Respondent's complaint infected the entire proceedings and the framework in which the trials proceeded. The practice "seriously affects the fairness, integrity or public reputation of judicial proceedings." Cotton at 631.

C. Dr. Kam's Presence Violated The Procedural Due Process Right To An Impartial Tribunal

Submitting disputes to a panel of three doctors who were mandated to make a recommended decision, violated the Due Process clause because of one of the panelists

(Kam's) pecuniary self interest. Gibson v. Berryhill, 411 U.S. 564, 578-79, S.Ct (1973).

The focus of this Court has not been limited to the judge's actions, but to the actions of the tribunal. In Re Murchision, 349 U.S. 133, 75 S.Ct. 623 (1955). There, a trial judge first convened a "one man judge-grand jury" and then tried and convicted two witnesses of contempt.

In reversing the Michigan Supreme Court, this Court found a due process violation when the trial judge who was part of the accusatory process thereafter conducted the trial. Likewise, at Bench, Petitioner was entitled to a fair tribunal, free of disqualifying bias, prior to final adjudication. "A trial before a tribunal financially interested in the result of its decision is a denial of due process of law." Tumey, supra 273 U.S. at 535. Emphasis added.

A fair tribunal has never been conceptually limited to judges. "A showing that administrative adjudicators were biased would establish a failing of procedural due process . . ." Green v. Amesqua, 212 F.3d 358, 368 (7th Cir. 2000); Connally v. Georgia, 429 U.S. 245, 251, 97 S.Ct. 546 (1977) (paying magistrates a $5 fee for granting a search warrant, but nothing for denying warrant applications, violates due process".

The standard is whether a "government official stands to profit economically." Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 243, 247, 100 S.Ct. 1610 (1980). Unlike the Marshall facts (247) the tainted panel member at Bench reviewed the complaint (III A, supra), against Petitioner and made a written, recommended disposition on disputed factual questions. Id. The function of the panelist here was

not, as in Marshall, "that of a prosecutor or civil plaintiff." Id. Respondent insurer well occupied that position.

Even if the state's appointed panel was, as Justice Lim concluded "just that, advisory" (Appn. B.6), the venality of one of its members was imputed to a state adjudicator. Unlike partisan experts, the advisory panel members at Bench were subject to the control of the adjudicator, a state official. Like special masters, the panel members are held to the same standards as adjudicators. Jenkins v. Sterlacci, 270 U.S. App. D.C. 296, 849 F.2d 627, 632 (U.S. App. 1988).

"Adjudicator" is a term used in a broad sense by this Court to include the tribunal itself, in structural error analysis. Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045 (1987) (judge and jury).

Like magistrates and special masters, the panel here was required to make recommended decisions to an adjudicator. Hawaii Administrative Rule ("HAR") 12-13-21; Jenkins, supra; Quillen v. Sec'y HHS, 793 F.2d 1293 (6th Cir. 1986).

A medical advisory panel member bought and paid for by Respondent insurance company had duties to recuse shared by adjudicators. The panelist, Dr. Kam was required sua sponte to determine if there was a conflict of interest. HAR §12-13-20 (C); U.S. v. Sartori, 560 F.Supp. 427, 431 (D.C. Md. 1983).

Since panel members also enjoyed, by statute, the cloak of a state adjudicator's absolute immunity (HRS §386-27(d)) the physicians on the state labor director's advisory panel were no different than court-appointed psychiatrists

in Hawaii to whom is extended the judicial brand of absolute immunity. The Hawaii Supreme Court has so held "to maintain the orderly administration of the judicial process". Seibel v. City and County of Honolulu, 63 Haw. 516, 522, 631 P.2d 173 (1981) ("reasons underlying judicial immunity, especially the freedom and independence to act without apprehension of possible adverse consequences apply equally to court appointed officials." Id at 523-525.

Thus, Justice Lim's rationale below, that panel members were not adjudicators and therefore not bound by the effects of financial interest rings hollow. As in Seibel, the panel members, as arms of the adjudicator, were bound by the same standards. Id at 525.

In upholding the state labor department's corrupt practice, the state courts trivialized the compensation limits set by the agency which were concerned with preventing both the possibility of bias and the appearance of bias. Syquia v. Board of Education, 80 N.Y.2d 531, 591 N.Y.S.2d 996, 606 N.E.2d 1387, 1390 (1992):

> "By prescribing equal compensation between the employee's designated panel member and the Boards designated member and by authorizing a system in which compensation would not be paid by either party, but rather from the Commissioners fund, the Legislature intended to eliminate even the appearance of financial influence." Emphasis added.

The state's answer to Syquia was to meticulously ignore the fact that Respondent insurance company had already hired, paid, and otherwise influenced its

designated panel member before the state paid him $200. Appn. B.6, ¶1.

By deliberately taking analytical steps to avoid confirming or denying the total overpayment to one of the panel members, the state courts were wrongly able to conclude that the insurer's panelist was paid the same as the others. Appn. B.6.

This odd approach avoided discussing the Respondent's panelist's (1) ongoing financial relationship in performing insurer IMEs (RA 118, 119) for Respondent (2) the panelist's financial gain in doing an IME and other work on the same case, before the state selected him and (3) his pecuniary interest in further business with Respondent insurer. It simply appears as if the Hawaii appellate court did not reach page 21 of the opening brief before it. It would have otherwise found Syquia (overpayment of member of tripartite panel by an institutional participant voids the result) and Carey v. Cvomo, 858 F.Supp.385, 387 (D.C. NY 1994). Op. Br. 21.

The state courts reached an unconstitutional end by erroneously comparing the labor department's medical advisory panel to privately retained experts or "hired quns." Appn. B.5. If this were true, then there would be no need for the $200.00 remuneration limits (HAR §12-13-22), and the ultimate use of experts would be determined by the litigants, and not by the director of labor. Hughes v. Long, 242 F.3d 121, 130 (3d Cir. 2001) (distinction between private versus court appointed experts).

Hawaii's indulgent and lowered expectations of, as the ICA put it, "party designated arbitrators" (Appn B.5) coupled with trivializing remuneration standards, does not

square with the use of appointed experts to avoid the "practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation." Notes of Advisory Committee on Rules, FRE 706.

II. ACTIONS BY HAWAII'S AGENCIES AND JUDICIARY VIOLATED THE FIFTH AND FOURTEENTH AMENDMENT

"The right to work for a living in the common occupations in the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure." Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7 (1915).

The decisions of the labor department (Appn. C) and the court (Appn. A, B) forces licensed physicians to employ physical therapists licensed in Hawaii as a condition to providing some of the medical services listed in the state's medical fee schedule. The state agency and a court rewrote the scope of practice of Hawaii physicians. This rule-making was "unreasonable governmental interference that comes within the 'liberty' and 'property' concepts of the Fifth Amendment". Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400 (1959).

The statutory scope of Appellant physician's practice, and his right to work in Hawaii, cannot be rewritten by agency actions on a medical fee schedule (MFS). The physician's scope of practice is broadly defined at HRS §453-1 ("Practice of medicine includes . . ."). Emphasis added.

Under HRS §453-1, even if physical therapy services were performed incident to Dr. Jou's services, those procedures were within the scope of a physician's license, rewritten by the state's action.

The MFS, which is incorporated into the state's administrative rules, unambiguously preserves the legislature's broad scope of licensure of doctors. HAR §12-13-31 (a): "All health care providers deemed qualified by the director may provide services to an injured employee. Treatment shall fall within the scope of the health care provider's license to practice." Emphasis added.

"Health care provider", a term defined by the MFS, was overlooked by the ICA. Here, the MFS incorporates HRS §382-1, which does not include licensed physical therapists or licensed massage therapists.

Therapeutic massage is unquestionably within a physician's scope of practice. The fight here is over whether state agencies and state courts may force physicians to hire licensed physical therapists instead of licensed massage therapists to perform services clearly and plainly within the state's statutory scope of licensure of physicians (HRS §453-1), and massage therapists. HRS §452.

Neither of these statutes can be rewritten or nullified by an agency or a court. To the extent the administrative fee schedule (MFS) (relied on by this Court) is inconsistent with the scope of licensure in the statutes, the MFS and judicial action thereon must constitutionally give way to the statutes. Agencies may not nullify statutes. P.U.C. (California) v. United Sates, 355 U.S. 534, 540, 78 S.Ct. 446 (1958); Oestereich v. Selective Service Board, 393 U.S. 233, 242, 89 S.Ct. 414 (1968) (Harlan, J., concurring).

III. THE STATE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY LIMITING A PHYSICIAN'S SCOPE OF PRACTICE

While Petitioner's brief below (Op. Br. 2) raised the question of equal protection, the ICA's legislation from the Bench was an additional violation.

The ICA's unpublished resolution of this dispute (Appn. B) placed Dr. Jou apart from other doctors; and, in its one-on-one context, intentionally treated Dr. Jou differently from other doctors similarly situated. Since there is found in the opinion no rational basis for the difference in treatment, the state court committed a grave violation of the Fourteenth Amendment, to the U.S. Constitution. Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073 (2000). Shelley v. Kraemer, 334 U.S. 1, 14, 68 S.Ct. 836 (1948).

IV. THE STATE VIOLATED THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY A REGULATORY TAKING UNDER PENNSYLVANIA COAL

The purpose of the state's action below was "not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 396-398, 43 S.Ct. 158 (1922). Those favored few are the Hawaii judges who retain their jobs after deliberations of Hawaii's nine-member Judicial Selection Commission. Three of the JSC's members earn all or a substantial amount of income from the state health and property casualty insurers. These are:

JSC's chair Sidney K. Ayabe, Esq. (property casualty) and Rosemary Fazio, Esq. (health insurer, HMSA, $+1.2B premium, 2002). See Martindale-Hubbell Law Directory; also Cmr Rpt. 45, 47. The third member of the Hawaii Judicial Selection Commission is Lois Sazawa, a corporate vice president for a large property casualty insurer.

Packing Hawaii's Judicial Selection Commission with individuals whose major clients and employers have scores of cases pending before state judges, at any given, time is outrageous. At least one judge has spoken out on the outcomes:

> "In the absence of any publicly stated reasons for a judge's failure to be retained, remaining jurists are left to speculate, creating an uncertain environment that some say can affect judicial independence. Some judges may temper decisions to avoid controversy or delay controversial decisions until after their retention votes, according to some judges and lawyers.
>
> James Dannenberg a retired district judge, said he knows colleaques who delayed issuing controversial decisions for months until after their retentions were approved. In one case the delay was more than a year, Dannenberg said. He declined to provide the names of the colleagues involved.
>
> "I'm telling you the judges I speak to are very nervous about this (system), said Dannenberg, who still does per-diem work on the bench. 'It takes a very good judge to

decide, I am not going to be swayed by this.'"
Emphasis added.
starbulletin.com/2004/05/30/news/story

Others favored more richly, by Hawaii's limiting its physicians' scope of practice, are the Respondent (+72M Hawaii premiums versus +25M in claims benefits, /02), and its Hawaii property-casualty industry colleagues ($1.7 billion, '02 premium, exclusive of life and annuity policies versus only $+708M in claims benefits in Hawaii in '02). Cmr. Rpt 19, 45.

Pitted now against these principalities and powerful forces is a single doctor, and the Untied States Constitution.

Petitioner's property rights to practice his profession were also written into state law. HRS §453-1. The court below was required to follow the statute, not rewrite it. Likewise, the agency was not free to depart from its own rule, HAR §12-13-31: "Treatment shall fall within the scope of the health care provider's license to practice".

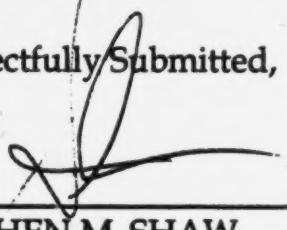
But for an unbridled, uncompensated common-law formulation by a state appellate court, Petitioner would be free to practice his profession as defined by the state's own rule of law. Shelley v. Kraemer, supra 334 U.S. at 17 n.19, 18.

CONCLUSION

This petition should be granted.

Dated: Honolulu, Hawaii, September 6, 2004.

Respectfully Submitted,



STEPHEN M. SHAW
P. O. Box 2353
Honolulu, Hawaii 96804
Tel: (808) 521-0800
Fax: (808) 531-2129

Attorney For Petitioner
EMERSON M.F. JOU, M.D.

FIRST INSURANCE COMPANY OF HAWAII, LTD.Respondent/Complainant-Appellee vs. EMERSON M.F. JOU, M.D., and EMERSON M.F.JOU, dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE,Petitioner/Respondent-Appellant and SPECIAL COMPENSATION FUND, Respondent/Appellee NO. 24806

SUPREME COURT OF HAWAI'I

2004 Haw. LEXIS 442

June 10, 2004, Decided

PRIOR HISTORY: [*1] CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS. CASE NO. MISC 90-001. *First Ins. Co. of Haw., LTD. v. Jou, 104 Haw. 322, 89 P.3d 535, 2004 Haw. App. LEXIS 144 (Haw. Ct. App., 2004)*

COUNSEL: Stephen M. Shaw for petitioner/respondent-appellant on the writ.

JUDGES: By: Duffy, J. for the court n1

n1 Considered by: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.

OPINION: ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI

Appendix A

Petitioner/Respondent-Appellant's application for writ of certiorari filed on June 1, 2004, is hereby denied.

DATED: Honolulu, Hawai'i, June 10, 2004.

NOT FOR PUBLICATION

NO. 24806

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI`I

FIRST INSURANCE COMPANY OF HAWAII, LTD.,
Complainant-Appellee,

vs.

EMERSON M. F. JOU, M.D., and EMERSON M. F. JOU, dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE,

Respondents-Appellants,

And

SPECIAL COMPENSATION FUND,

Appellee

Appendix B

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(Case No. MISC 90-001)
(C-9001) (2-87-11296)

SUMMARY DISPOSITION ORDER
(By: Lim, Acting C.J., Foley and Nakamura, JJ.)

Respondent-Appellant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine (Dr. Jou or Appellant), appeals the December 17, 2001 decision and order of the Labor and Industrial Relations Appeals Board (the Appellate Board). The Appellate Board's decision and order affirmed the November 21, 1990 decision and the October 30, 1991 supplemental decision of the Director of Labor and Industrial Relations (the Director), both in favor of Complainant-Appellee First Insurance Company of Hawaii, Ltd. (FICOH), and both of which Dr. Jou had appealed to the Appellate Board.

Upon a painstaking review of the record and the briefs submitted by the parties, and giving sedulous consideration to the arguments advanced and the issues raised by the parties, we resolve Dr. Jou's points of error on appeal as follows:

1. Dr. Jou first avers that the advisory panel, convened by the Director for assistance pursuant to Hawaii Revised Statutes (HRS) § 386-27(d) (1993)[1] and Hawaii Administrative Rules (HAR) §§ 12-13-20, -21 & -22 (January 1, 1990 - December 31, 1992), violated his constitutional rights. Specifically, Dr. Jou contends, "At least one decisionmaker relied on by the agency (Dr. Calvin [C.M.] Kam [(Dr. Kam)]), was personally and financially

interested in his decision against Appellant, in violation of Article 1, Section 5 of the Constitution of the State of Hawaii, and the Fifth and Fourteenth Amendments to The United States Constitution." Opening Brief at 2 (citation to appendix omitted). This argument is unavailing. Dr. Jou's appeal to the Appellate Board was a *de novo* proceeding, HRS § 386-27(d) ("Any person aggrieved by a decision of the director may appeal the decision under section 386-87."); HRS § 386-87(b) (1993) ("The appellate board shall hold a full hearing de novo on the appeal."), and nothing in the record indicates the Appellate Board relied upon the recommendations the advisory panel made to the Director. Indeed, the record affirmatively shows that the Appellate Board could not have relied upon the panel's recommendations, because the propriety *vel non* of the Director's convening of the advisory panel -- specifically, FICOH's choice of Dr. Kam -- was an issue to be decided and in fact decided on appeal by the Appellate Board at the behest of Dr. Jou. Furthermore, we are somewhat nonplused by Dr. Jou's animadversions upon alleged bias on the part of Dr. Kam, because an advisory panel member selected by a party pursuant to HRS § 386-27(d) can be expected to be attuned to that party. Cf. Daiichi Hawaii Real Estate Corp. v. Lichter, 103 Hawaii 325, 343, 82 P.3d 411, 429 (2003) ("Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral,' at least in the sense that the third arbitrator or a judge is." (Citation and internal quotation marks omitted.)). Dr. Jou well realized this fact of life all along, as is evidenced by his objection to the selection of Dr. Kam, raised before the panel convened, as "the other side's hired gun[.]" We note in this respect that Dr. Jou selected his own "hired gun" to serve on the advisory panel. In any event, Dr. Jou does not point out,

and nothing in the record indicates, that Dr. Kam -- though certainly strongly opinionated against Dr. Jou's diagnoses and treatments -- participated in the advisory panel unfairly, dishonestly or in bad faith. Cf. id. at 344, 82 P.3d at 430 ("The fact that party selected arbitrators are not expected to be 'neutral,' however, does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest, and good-faith manner." (Brackets, citation and internal quotation marks omitted.)). As for Dr. Jou's allegation that Dr. Kam was paid more than the other panel members, the record confirms that Dr. Kam was paid by the special compensation fund the same amount ($200) as the other panel members, pursuant to HRS § 386-27(d) and HAR § 12-13-22. Finally, we observe that all of the cases relied upon by Dr. Jou in this connection dealt with adjudicators. See, e.g., In re Water Use Permit Applications, 94 Hawai`i 97, 122, 9 P.3d 409, 434 (2000). In our case, the advisory panel was just that, advisory. This final point also disposes of Dr. Jou's cursory argument that the advisory panel scheme of HRS § 386-27(d) "impermissibly delegated governmental power to private individuals[.]" Opening Brief at 26 (citation to the appendix omitted)).

2. Dr. Jou next asserts that the workers' compensation medical fee schedule (MFS), by restricting compensation for physical therapy to services provided by "duly registered physical therapist[s,]" HAR § 12-13-1 (January 1, 1987 - December 31, 1989) (definition of "therapist"), "is inconsistent with the licensing statutes for physicians in this State." Opening brief at 27 (citation omitted). Essentially, Dr. Jou, a physiatrist, invokes a sort of medical hierarchy in arguing that a physiatrist may bill under the MFS for any services, including physical therapy services, rendered within the physiatrist's field of expertise,

regardless of whether the physiatrist is licensed to provide the particular services. For support, Dr. Jou cites the licensing statutes for physicians and certain Medicare billing policies, all of which are, however, inapposite and unavailing. Besides, Dr. Jou admitted, and the Appellate Board found, that he did not provide the physical therapy services he billed for and, indeed, was elsewhere in his clinic when the services were being provided by unlicensed staff. Dr. Jou also contends the relevant provisions of the MFS work a taking of his property without due process of law, "in violation of the Fifth Amendment U.S. Constitution and Article 1, Section 5 of the Hawaii Constitution[.]" Opening Brief at 27 (capitalization modified). Dr. Jou makes no detectable argument in support of this assertion, and thus fails in his burden on appeal to prove the administrative provisions unconstitutional beyond a reasonable doubt, and to show the constitutional defect clearly, manifestly and unmistakably. Sifagaloa v. Bd. of Tr. of the Employees' Ret. Sys. of the State of Hawaii, 74 Haw. 181, 191, 840 P.2d 367, 371 (1992). This second point on appeal lacks merit.

3. Dr. Jou's final argument, in its entirety, is as follows: "Any alleged violation was to be calculated within the two year bar, pursuant to HRS § 386-27(d). As to those alleged violations there was no jurisdiction to include them in the calculations." Opening Brief at 32. We disagree. HRS § 386-27(d) provides in pertinent part that, "No sanction shall be imposed by the director under this section except upon submission of a written complaint which shall specifically allege that a violation of this section occurred within two years of the date of the complaint." In construing statutes, "our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself."

Water Use, 94 Hawai`i at 144, 9 P.3d at 456 (citation and block quote format omitted). The written complaint in this case specifically alleged that more than a hundred violations of HRS § 386-27 occurred within two years of the date of the complaint.

Therefore,

IT IS HEREBY ORDERED that the December 17, 2001 decision and order of the Appellate Board is affirmed.

DATED: Honolulu, Hawaii, May 7, 2004.

On the briefs:

Stephen M. Shaw, for respondent-appellant.

Dennis E. W. O'Connor,
Kelvin H. Kaneshiro and
Jeffrey K. Hester (Reinwald, O'Connor & Playdon), for complainant-appellee.

1. Hawaii Revised Statutes (HRS) § 386-27 (1993) provides:

(a) All health care providers rendering health care and services under this chapter shall be qualified by the director and shall remain qualified by satisfying the requirements established in this section. The director shall qualify any person initially who has a license for the practice of:

(1) Medicine under chapter 453;

(2) Dentistry under chapter 448;

(3) Chiropractic under chapter 442;

(4) Osteopathy under chapter 460;

(5) Naturopathy under chapter 455;

(6) Optometry under chapter 459;

(7) Podiatry under chapter 463E; or

(8) Psychology under chapter 465.

(b) To remain a qualified provider under this chapter a health care provider shall:

(1) Comply with guidelines established by the director on the frequency of treatment and reasonable utilization of health care and services;

(2) Conform to limitations established by the director for charges on services under medical fee and other fee schedules;

(3) File timely reports required under section 386-96;

(4) Avoid unnecessary and unreasonable referrals of injured employees to other health care providers;

(5) Refrain from ordering unnecessary and unreasonable diagnostic tests and studies;

(6) Remain available as a treating health care provider to injured employees and as an advisor to the director in proceedings under this section; and

(7) Comply with all requirements established under this chapter and by rules and decisions adopted and issued by the director pursuant to this chapter.

(c) Any health care provider who fails to comply with subsections (a) and (b) may be subject to such sanctions deemed just and proper by the director which may include:

(1) Disallowance of fees for services rendered to an injured employee;

(2) Forfeiture of payments for services rendered to an injured employee under this chapter;

(3) Fines of not more than $1,000 for each violation;

(4) Suspension as a qualified provider; and

(5) Disqualification as a provider of services under this chapter.

(d) No sanction shall be imposed by the director under this section except upon submission of a written complaint which shall specifically allege that a violation of this section occurred within two years of the date of the complaint. A copy of the complaint shall be sent to the health care provider charged promptly upon receipt by the

director. The director may establish an advisory panel of health care providers consisting of three members, one selected by the complainant, another selected by the health care provider charged, and the third selected by the director who shall assist the director in any case arising under this section. Fees for services rendered by members of the advisory panel shall be paid for by the special compensation fund. No member of the advisory panel shall be liable in damages for libel, slander, or other defamation of character of any party for any action taken while acting within their capacities as members of the advisory panel.

The director shall issue, where a sanction is ordered under this section, a written decision of findings following a hearing held upon not less [than] twenty days written notice to the complainant and the health care provider charged. No violation shall be found unless the director determines that the violator acted in bad faith. Any person aggrieved by a decision of the director may appeal the decision under section 386-87.

(e) In any case arising under this section, the injured employee treated by the health care provider charged with a violation of this section shall not be a party to the proceeding and shall not appear unless called as a witness before the director or the appellate board. Charges for services rendered by the health care provider alleged to be in violation of this section shall be suspended pending action by the director and the appellate board in cases on appeal.

In any case in which fees for services rendered by a health care provider are disallowed by the director, the health care provider shall be ordered to forfeit payment.

FIRST INSURANCE COMPANY, OF HAWAII, LTD.,Complainant-Appellee, vs. EMERSON M.F. JOU, M.D., and EMERSON M.F. JOU, dbaCOMPREHENSIVE CLINIC OF REHABILITATION MEDICINE, Respondent-Appellant, andSPECIAL COMPENSATION FUND, Appellee

CASE NO. AB MISC 90-001; C-9001; 2-87-11296

Hawaii Labor and Industrial Relations Appeals Board

2001 HI Wrk. Comp. LEXIS 150

December 17, 2001

COUNSEL:
Dennis E.W. O'Connor, Esq., Kelvin H. Kaneshiro, Esq., for Complainant-Appellee; Stephen M. Shaw, Esq., for Respondent-Appellant; Leo B. Young, Esq., for the Special Compensation Fund-Appellee

JUDGES: RANDALL Y. IWASE, Chairman; CAROL K. YAMAMOTO, Member; VICENTE F. AQUINO, Member, concurring

OPINION:
[*1] [*1]

DECISION AND ORDER

This workers' compensation case is before the Board on appeals by EMERSON M.F. JOU, M.D. and EMERSON M.F. JOU, dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE ("Dr. Jou ") from the

Appendix C

decisions of the Director dated November 21, 1990 and October 30, 1991.

Procedural History

On November 21, 1990, the Director issued a decision in which he determined that Dr. Jou acted in "bad faith" and violated Hawaii Revised Statutes ("HRS") § 386-27. The Director ordered Dr. Jou to forfeit or reimburse FIRST INSURANCE COMPANY OF HAWAII, LTD. ("First Insurance") for payments made to Dr. Jou for services that were not allowed or authorized by the Hawaii Workers' Compensation Administrative Rules and Medical Fee Schedule ("MFS"). The Director further ordered Dr. Jou not to charge the disallowed fees to Pao Watanabe ("Claimant") and to pay a fine of $7,000.00, payable to the SPECIAL COMPENSATION FUND ("SCF") for violating the workers' compensation statute, the related administrative rules, and the MFS.

Dr. Jou appealed the November 21, 1990 decision to the Board.

By letter dated November 29, 1990, First Insurance advised the Director that he neglected to rule on its[*2] request[*2] for assessment of partial attorney fees and costs against Dr. Jou for prosecuting the HRS § 386-27 complaint at the Disability Compensation Division.

By letter dated December 7, 1990, the Director denied First Insurance's request for partial attorney's fees and costs.

By Order of Temporary Remand dated April 2, 1991, the Board remanded the case back to the Director to determine, among other things, the correct amount that Dr. Jou

should have billed for his services, and the amount that Dr. Jou should reimburse to First Insurance for unauthorized or disallowed billings.

On October 30, 1991, the Director issued a supplemental decision that allowed Dr. Jou fees of $2,241.93 for services provided to Claimant for the period between August 31, 1987 and July 27, 1990, and ordered him to reimburse First Insurance the amount of $16,950.61. -

Issues on Appeal

The issues for determination on appeal are:

1. Whether the Director properly concluded that Dr. Jou had violated the requirements of HRS § 386-27, and the related administrative rules and MFS so as to order Dr. Jou to reimburse First Insurance for billings for medical care provided to Claimant relative to her injury [*3] of March 11, 1987, [*3] not authorized or computed in accordance with the administrative rules; n1

n1 This case involves the interpretation and application of Title 12 Chapter 13 of the administrative rules, which includes the MFS, and HRS § 386-27 that were in effect during the period Dr. Jou treated Claimant. As indicated in our findings below, Dr. Jou treated Claimant between August of 1987 and July of 1990.

2. Whether the Director properly determined that disallowed fees are not chargeable to Claimant, pursuant to § 12-13-13(a) (14) of the administrative rules and MFS;

3. Whether the Director properly convened the medical panel;

4. Whether First Insurance is entitled to attorney's fees and costs incurred at the Disability Compensation Division to be paid by Dr. Jou; and

5. Whether the reimbursement ordered by the Director in his supplemental decision of October 30, 1991, was properly calculated; if not, what is the reimbursement that should be allowed for unauthorized or disallowed billings, if any.

For the reasons stated below, we affirm the Director on all issues.

FINDINGS OF FACT

1. Between August 31, 1987 and July 27, 1990, Dr. Jou treated Claimant for a work injury [*4] by providing various modalities[*4] of physical therapy and conservative treatment.

2. Dr. Jou is a medical doctor whose practice is in the field of physiatry.

3. For the period between August 31, 1987 and July 27, 1990, Dr. Jou employed a staff of licensed massage therapists and physical therapy assistants who were not registered physical therapists. Dr. Jou did not have any licensed or registered physical therapists on his staff during the period in question.

4. Some of the members of Dr. Jou's staff of massage therapists or physical therapy assistants provided

treatment or physical therapy to Claimant during the period in question.

5. On March 5, 1990, First Insurance filed with the Director a Complaint pursuant to HRS § 386-27, alleging, among other things, that Dr. Jou violated HRS § 386-26 and -27, Administrative Rules § 12-13-12(b), § 12-13-13(a), § 12-13-36, § 12-13-38, § 12-13-40, § 12-13-80, and § 12-13-91, and § 12-13-95 of the MFS during the treatment of Claimant. Some of the allegations contained in the Complaint included bad faith submission of misleading billings and failure to file the proper reports as required by the administrative rules and MFS.

6. Pursuant to[*5] HRS § 386-27, the Director exercised [*5] its option to convene a three-member advisory panel of health care providers to assist him in evaluating the allegations contained in First Insurance's Complaint.

As provided for by statute, First Insurance exercised its choice of physician to serve on the panel by selecting Dr. Calvin Kam. Dr. Jou selected Dr. Bernard Portner as his choice to serve on the panel. The Director selected Dr. David Kimura as his choice to serve as Chairperson of the panel.

7. Claimant objected to First Insurance's selection of Dr. Kam as a panelist. According to Claimant, Dr. Kam was a biased panelist, because he was previously retained by First Insurance in Claimant's workers' compensation case to evaluate the propriety of Dr. Jou's treatment, and had rendered an opinion adverse to Dr. Jou in this regard.

8. On or about July 3, 1990, the advisory panel was convened by the Director. Dr. Jou appeared before the

panel to address the allegations contained in the Complaint and to present his position.

9. On July 20, 1990, Dr. Portner and Dr. Kimura submitted a joint report containing their opinions and recommendations. Dr. Portner and Dr. Kimura determined that[*6] based on their review of the medical records [*6] and Dr. Jou's testimony before the panel, Dr. Jou may have violated administrative rules § 12-13-13(10)(d) through his persistent use of treatment of non-specific measures. Dr. Portner and Dr. Kimura recommended that Dr. Jou be reprimanded.

Dr. Kam did not agree with all of the opinions set forth by Dr. Portner and Dr. Kimura, and submitted his own "minority opinion." It was Dr. Kam's opinion that Dr. Jou violated more than just § 12-13-13(10)(d) by not referring Claimant for psychiatric care, by not obtaining medical records from medical providers who had treated Claimant in the past, by prolonging passive physical therapy when it was no longer necessary, and by not following reporting requirements. Dr. Kam, however, concurred with the majority's recommendation of a reprimand.

The panel's decision did not address the allegations relating to Dr. Jou's billing or reporting procedures, because those issues did not require medical expertise.

10. On August 21, 1990, First Insurance filed an Amended Complaint against Dr. Jou, pursuant to HRS § 386-27, to include additional allegations of wrongdoing that included, among other things, [*7] bad faith by Dr. Jou when he allowed at least two unlicensed[*7] physical therapists to provide physical therapy to Claimant without direct supervision by Dr. Jou, and billed First Insurance for

those services as though they were provided by licensed physical therapists.

11. By decision dated November 21, 1990, the Director determined that Dr. Jou committed bad faith and violated HRS § 386-27 and related administrative rules, including § 12-13-13(a)(3), (4), and (8). In his decision, the Director found that Dr. Jou provided treatments that were unnecessary and inappropriate, that he allowed unlicensed individuals to provide physical therapy treatments to Claimant without proper supervision, that Dr. Jou improperly billed these services under codes reserved for registered physical therapists, that he failed to prepare or submit appropriate reports to indicate the nature and efficacy of the treatment he provided to Claimant, and that he submitted inaccurate and misleading bills for payment. The Director disallowed billings for physical therapy treatments provided by unlicensed physical therapists, ordered Dr. Jou to forfeit or reimburse First Insurance for payments on billings that[*8] were not authorized by the administrative rules or the MFS, and, [*8] in accordance with § 12-13-13(a)(14) of the administrative rules, prohibited Dr. Jou from charging the disallowed fees directly to Claimant. The Director fined Dr. Jou $7,000.00 payable to the SCF.

12. Dr. Jou appealed the Director's November 21, 1990 decision to the Board.

13. By Order dated April 2, 1991, the Board temporarily remanded the case back to the Director to determine the correct amount that Dr. Jou should have billed to First Insurance and the amount that Dr. Jou must reimburse to First Insurance for payments made for billings that were not allowed by law.

14. While the case was on remand, First Insurance hired AccuMed, a medical billing service company, to audit Dr. Jou's billings in Claimant's case.

15. Records show that between August 31, 1987 and July 27, 1990, Dr. Jou billed First Insurance a total of $23,503.14 for treatments provided to Claimant for her work injury. First Insurance paid Dr. Jou $19,192.54 for treatments provided to Claimant for her work injury.

16. Based on its review of the billing records, AccuMed determined that Dr. Jou was entitled only to $5,698.98 for services provided[*9] to Claimant. First Insurance submitted the AccuMed audit to the Director[*9] as evidence, and requested a reimbursement of $13,493.56 ($19,192.54 - $5,698.98), based on the AccuMed calculations.

17. At an October 4, 1991 hearing before the Director, Dr. Jou, who was represented by counsel, sought to exclude the AccuMed calculations from evidence. The Director did not exclude the AccuMed report, but instead, granted Dr. Jou's request for time to respond to the AccuMed report, and allowed Dr. Jou until October 15, 1991, to submit a written response to rebut the AccuMed report.

Dr. Jou, however, did not submit any written response or rebuttal to the AccuMed report by October 15, 1991.

18. By supplemental decision dated October 30, 1991, the Director determined that Dr. Jou was entitled to fees in the amount of $2,241.93 for services provided to Claimant from August 31, 1987 to July 27, 1990. The Director ordered Dr. Jou to reimburse First Insurance the sum of $16,950.61 ($19,192.54 - $2,241.93). The Director reiterated that only

physical therapy treatments performed by licensed or registered physical therapists would be allowed and that First Insurance shall not be liable for[*10] any treatments not covered by approved treatment plans.

19. Dr. Jou, through [*10] his attorney, appealed the October 30, 1991 supplemental decision. According to Dr. Jou, the heart of the dispute on this appeal is whether he, as a physiatrist and medical doctor, should be allowed to submit bills for services provided by licensed massage therapists or physical therapy assistants pursuant to codes reserved for registered physical therapists.

Bad Faith

20. During the period he treated Claimant, Dr. Jou was aware that, pursuant to the administrative rules and the MFS, the billing codes 97418 and 97419 were reserved for physical therapy treatment provided by registered physical therapists. Dr. Jou knew of this since 1986.

21. Dr. Jou admitted in his deposition of May 22, 2001, and at trial that he did not employ any registered physical therapists on his staff during the period he treated Claimant. Dr. Jou also did not employ any licensed or unlicensed physician assistants on his staff during the period Claimant was under his care.

22. Massage therapists and physical therapy assistants employed by Dr. Jou provided physical therapy treatments to Claimant during the period she treated [*11]with him.

23. Dr. Jou billed First Insurance for treatments provided by his massage [*11]therapists and physical

therapy assistants as physical therapy performed by registered or licensed physical therapists under MFS billing codes 97418 and 97419.

24. Dr. Jou knowingly used the billing codes that were reserved for registered physical therapists even though no registered physical therapists provided treatment to Claimant.

25. Dr. Jou believed that the MFS that was in effect when he treated Claimant was "wrong" when it only allowed registered physical therapists to receive full payment for physical therapy services. According to Dr. Jou, prior to 1986, the law did not restrict codes 97418 and 97419 to registered physical therapists. In or around 1986, Dr. Jou discovered that the law had changed.

26. Dr. Jou did not agree with the MFS that allowed for full payment of physical therapy services provided by a registered physical therapist, and less than full payment if he, who is a physiatrist, but not a registered physical therapist, or any other nonregistered physical therapist, performs physical therapy on Claimant. According to Dr. Jou, under his interpretation of the MFS and § [*12] 12-13-45 of the administrative rules as it applies to physician assistants, he would only receive[*12] 60% of what a registered physical therapist would receive for the same service, even though, in his view, he was more educated than a physical therapist, and more qualified to provide physical therapy. n2 Dr. Jou believed that it was wrong to compensate a physical therapist more than a physician.

n2 Under § 12-13-45 of the administrative rules, a physician may bill for services performed by a licensed

physician assistant under his direct supervision at a reduced rate of 60% of the allowable charges. Section 12-13-45 is not applicable in this case, because Dr. Jou did not employ any licensed physician assistants and because physical therapy was not performed by any licensed physician assistants under his direct supervision.

27. Notwithstanding Dr. Jou's arguments, there is no evidence that Dr. Jou ever personally provided physical therapy treatment to Claimant in this case. Physical therapy, in this case, had always been provided by licensed massage therapists and physical therapy assistants employed by Dr. Jou. Dr. Jou was in the building seeing other patients at the time physical[*13] therapy was being provided to Claimant by his staff of licensed massage therapists or physical therapy[*13] assistants, but he was not in the room where the treatments were taking place or otherwise directly supervising the provision of treatment by his staff.

28. Dr. Jou admitted that he never advised First Insurance that the physical therapy that he was billing for in Claimant's case was not performed by registered physical therapists. Dr. Jou stated that the subject never came up and he did not volunteer the information to First Insurance.

29. At some point in his testimony at trial, Dr. Jou indicated that he was confused by the MFS. Yet, at the same time, Dr. Jou stated that he disagreed with the MFS as it related to charges under the codes for registered physical therapists.

Based on Dr. Jou's testimony at trial, including his awareness and understanding of the changes in the MFS before and after 1986, we find that Dr. Jou was not confused about the law at the time he was treating Claimant and that he knew that what he was doing with respect to billing First Insurance for treatments that were not being performed by registered physical therapists was contrary to the law. We[*14] further find that Dr. Jou's bills misled First Insurance into believing that the physical therapy that it was [*14] paying for was performed by licensed physical therapists.

30. Based on the foregoing, we find that, with respect to the billing issue, Dr. Jou violated § 12-13-92 of the MFS by using improper billing codes reserved only for registered physical therapists and § 12-13-13(a)(8) by submitting misleading bills to First Insurance.

31. We further find that by billing First Insurance for physical therapy services under codes reserved for registered physical therapists even though he knew that the work he was billing for was not performed by registered physical therapists, Dr. Jou acted dishonestly and fraudulently.

32. Having found that Dr. Jou acted dishonestly and fraudulently in his billings, we further find that Dr. Jou's actions constituted bad faith for purposes of HRS § 386-27, § 12-13-1, and § 12-13-14.

Calculation of Amount of Reimbursements

33. First Insurance's Exhibit 6 shows the Director's work product in arriving at the sums specified in the October 30, 1991 supplemental decision. Based on our review of the

record, it appears that the Director reviewed all[*15] of the bills submitted by Dr. Jou to First Insurance, and disallowed all billings that were made under codes 97418 and[*15] 97419. After that, the Director reviewed all of the treatment plans that were submitted by Dr. Jou and disallowed all treatments that were not covered by any approved treatment plans.

After deducting the disallowed billings, the Director determined that Dr. Jou was entitled to payments of $2,241.93. Since First Insurance had paid Dr. Jou $19,192.54, the Director ordered Dr. Jou to reimburse First Insurance the sum of $16,950.61.

34. Dr. Jou objected to the Director's calculations, alleging that it was improperly based on the AccuMed report. Dr. Jou's Exhibit A, which was submitted on appeal, shows his calculations.

The first column of Exhibit A reflects Dr. Jou's billings according to his interpretation of the MFS. Under Dr. Jou's interpretation, he should be allowed to use codes 97418 and 97419 even though no registered physical therapists provided physical therapy services to Claimant.

The second column of Exhibit A reflects Dr. Jou's billings according to his interpretation of the Director's November 21, 1990 decision. Under this interpretation, Dr. [*16] Jou amended his codes from 97418 and 97419 to other codes that would allow him to receive reduced payment for the same services. [*16]

The third column of Exhibit A reflects Dr. Jou's billings according to the AccuMed report.

35. Dr. Jou's Exhibit A did not specifically address the Director's calculations that formed the bases for the October 30, 1991 supplemental decision. According to Dr. Jou, he was unaware of the Director's October 30, 1991 supplemental decision until 1999, even though he was represented by counsel when the supplemental decision was issued. It was Dr. Jou's understanding that the Director's October 30, 1991 supplemental decision was based on the improper AccuMed audit.

36. Contrary to Dr. Jou's assertions, the Director's calculations in the October 30, 1991 supplemental decision were not based on the AccuMed report submitted by First Insurance. The Director's calculation of the amount of reimbursement differed from the AccuMed calculation.

37. Based on our review of the record, we find that the Director properly disallowed billings for treatments that were performed by individuals who were not licensed physical therapists.

38. With respect to the Director's[*17] disallowance of billings for office visits or treatments not covered by an approved treatment plan, we reviewed Exhibit 6 and the Director's[*17] calculations and find that Dr. Jou billed First Insurance for certain treatments that were in excess of the guidelines set by the administrative rules, and not covered by an approved treatment plan, in violation of § 12-13-38 of the administrative rules. Accordingly, we find that the treatments identified by the Director were not authorized treatment under the administrative rules.

39. Dr. Jou testified at trial that he believed that all of his treatments were performed pursuant to approved treatment plans. Dr. Jou provided no explanation as to

why certain treatments, as identified in First Insurance's Exhibit 6, were not covered by an approved treatment plan. Dr. Jou presented no documentary evidence to rebut the Director's findings or Exhibit 6.

40. Having reviewed Exhibit 6 and the Director's calculations, we find that the Director's calculation of the amount of reimbursement to be paid by Dr. Jou was proper and supported by the record.

CONCLUSIONS OF LAW

1. Under HRS § 386-27 and § 12-13-14 of the administrative rules, the Director, **[*18]** after a finding of bad faith, may sanction a medical provider with, among other things, disallowance of fees for services rendered to an injured employee, **[*18]** or forfeiture of payments for services rendered to an injured employee.

For purposes of § 386-27 and § 12-13-14, bad faith, according to § 12-13-1 of the administrative rules, requires a finding of a fraudulent, malicious, dishonest, or frivolous act or omission. Mere carelessness, bad judgment, or ordinary negligence, in and of themselves, do not constitute bad faith.

In this case, we found that Dr. Jou acted dishonestly and fraudulently in his billings for physical therapy, and that his actions constituted bad faith.

Based on our findings, we conclude that the Director properly determined that Dr. Jou violated the requirements of HRS § 386-27, and the related administrative rules and MFS, and properly ordered reimbursement to First Insurance for billings for services

that were not authorized or computed in accordance with the rules or the MFS.

2. Section 12-13-13(a)(14) of the administrative rules prohibits a health care provider from charging fees to an injured employee which have been disallowed or forfeited. Accordingly, [*19] we conclude that the Director properly determined that disallowed fees are not chargeable to Claimant.

3. Pursuant to HRS § 386-27(d) and § 12-13-20, the Director[*19] has the discretion to convene an advisory panel if he determines that one is necessary. Our review of the record shows that the panel was convened in accordance with the statute and related administrative rules. Claimant has presented no evidence to show that the panel was improperly convened. Claimant's objection to First Insurance's choice of panelist is not a legal ground to bar the Director from convening an advisory panel.

4. First Insurance did not present any evidence or argument on appeal as to why the Director erred in denying its request for attorney's fees and costs incurred at the DCD level to be paid by Dr. Jou. Because First Insurance failed to sustain its burden to show that the Director erred on this issue, we conclude that First Insurance is not entitled to attorney's fees and costs sustained at the DCD.

5. Based on the foregoing findings and Dr. Jou's failure to rebut successfully the Director's calculations, we conclude that the amount of reimbursement ordered by the Director in his supplemental[*20] decision of October 30, 1991, was properly calculated.

ORDER

The decisions of the Director, dated November 21, 1990 and October 30, 1991, are affirmed, in accordance with[*20] the foregoing.

Dated: Honolulu, Hawaii, DEC 17 2001.

CONCURBY: VICENTE F. AQUINO, Member

CONCUR:

I concur:

The fundamental issue in this case is whether Dr. Emerson M.F. Jou ("Dr. Jou ") acted in "bad faith", thereby violating Section 386-27, HRS, when he billed First Insurance Company of Hawaii, Ltd., ("First Insurance") for services of licensed physical therapists ("PT") performed by unlicensed PT.

During the period he treated Claimant, Dr. Jou had no employed licensed PT and knew that Claimant was actually being treated by his unlicensed PT yet he continued to bill First Insurance for services reserved for licensed PT. The evidence clearly indicates that this sole motive in doing so was to charge First Insurance higher than what he could have charged as a physician. The fact that the subject never came up is inconsequential. Here, his modus operandi was obviously designed to mislead or deceive First Insurance. This is not a case of mere bad judgment or negligence, but rather a conscious doing of a wrong because of dishonest[*21] purpose, which constitutes "bad faith" under Section 386-27, HRS.

I would affirm the Director's decisions dated November 21, 1990 and October 30, 1991.

SUPREME COURT RULE 14(F) TEXT OF PROVISIONS INVOLVED (Emphasis Added)

A. Medicare B. News, August 14, 1998

. . .

. . .

"Services may be billed under one of three different practitioner benefits: (1) by physicians as their own professional services or as services of their employees furnished 'incident to' their professional services (2) by physical therapists in independent practice or (3) by occupational therapists in independent practice. The term 'provider' in this policy includes any of these three." [Emphasis added.]

. . .

. . .

"This term means services that are:

1. furnished as an integral, although incidental, part of a physician's personal professional services;
2. performed under the physician's direct personal supervision;
3. performed by therapists or other auxiliary personnel who are employees of the physician; and
4. furnished during a course of treatment where the physician performs an initial direct, personal, professional service and performs subsequent services at a frequency that reflects his/her continuing active participation in the management of the course of treatment." Id. [Emphasis added.]

. . .

This term [direct personal supervision] means that the provider must be physically present in the same office suite and immediately available to provide assistance and direction throughout the time the employee is performing services.

In a physician-directed clinic where responsibility is shared for supervision of medical services performed by employees of the clinic, the physician who orders a service is not necessarily the same physician who provides direct personal medical supervision while the service is performed (MCM 2050f.)."

B. Code Of Federal Regulations, 42 CFR 410.60

@410.60 Outpatient physical therapy services: Conditions.

(a) Basic rules. Medicare Part B pays for outpatient physical therapy services if they meet the following conditions:

(1) They are furnished to a beneficiary while he or she is under the care of a physician who is a doctor of medicine, osteopathy, or podiatric medicine.

(2) They are furnished under a written plan of treatment that meets the requirements of @410.60.

(3) They are furnished –

(i) By a provider as defined in @489.2 of this chapter, or by others under arrangements with, and under the supervision of, a provider; or

(ii) By or under the personal supervision of a physical therapist in private practice as described in paragraph (c) of this section.

(b) Out patient physical therapy services furnished to certain inpatients of a hospital or a CAH or SNF. Medicare Part B pays for outpatient physical therapy services furnished to an inpatient of a hospital, CAH, or SNF who requires them Medicare Part A.

(c) Special provisions for services furnished by physical therapists in private practice. (1) Basic qualifications. In order to qualify under Medicare as a supplier of outpatient physical therapy services, each individual physical therapist in private practice must meet the following requirements:

.....

.....

(iii) Bill Medicare only for services furnished in his or her private practice office space,or in the patient's home. A therapist's private practice office space refers to the location9s) where the practice is operated, in the State(s) where the therapist (and practice, if applicable) is legally authorized to furnish services, during the hours that the therapist engages in practice at that location. When services are furnished in private practice office space, that space must be owned, leased, or rented by the practice and used for the exclusive purpose of operating the practice. A patient's home does not include any institution that is a hospital, a CAH, or a SNF.

...

C. Excerpts From Hawaii's medical Fee Schedule

"PHYSICAL MEDICINE

The following values apply only when these services are under the continuous and direct supervision of a physician. Additional charges for office visits are allowed when specific additional services warrant such extra charges (e.g., major dressing, special examination). Only physical therapists licensed to practice in the State of Hawaii may provide physical therapy services."

— —

— —

"97417 each additional 15 minutes . . . . . .

97418 Physical therapy treatment by registered physical therapist including combination of any of the above modalities and procedures, initial 15 minutes 1.0

97419 each additional 15 minutes .....1.0"

See Petitioner's application below for discretionary review in the Hawaii Supreme Court at 9 and Appendices 9-13, thereof.

D. Hawaii Statute Relating To State's Appointed Advisory Panel Charged With Subpoena Powers Complaint Review And "Recommending Agency Decisions"

[§386-27] Qualification and duties of health care providers. (a) All health care providers rendering health care and services under this chapter shall be qualified by

the director and shall remain qualified by satisfying the requirements established in this section. The director shall qualify any person initially who has a license for the practice of:

(1) Medicine under chapter 453;

. . . ...

. . . . . .

(b) To remain a qualified provider under this chapter a health care provider shall:
(1) Comply with guidelines established by the director on the frequency of treatment and reasonable utilization of health care and services;
(2) Conform to limitations established by the director for charges on services under medical fee and other fee schedules;
(3) File timely reports required under section 386-96;
(4) Avoid unnecessary and unreasonable referrals of injured employees to other health care providers;
(5) Refrain from ordering unnecessary and unreasonable diagnostic tests and studies;
(6) Remain available as a treating health care provider to injured employees and as an advisor to the director in proceedings under this section; and
(7) Comply with all requirements established under this chapter and by rules and decisions adopted and issued by the director pursuant to this chapter.

(c) Any health care provider who fails to comply with subsections (a) and (b) may be subject to such sanctions deemed just and proper by the director which may include:

(1) Disallowance of fees for services rendered to an injured employee;
(2) Forfeiture of payments for services rendered to an injured employee under this chapter;
(3) Fines of not more than $1,000 for each violation;
(4) Suspension as a qualified provider; and
(5) Disqualification as a provider of services under this chapter.

(d) No sanction shall be imposed by the director under this section except upon submission of a written complaint which shall specifically allege that a violation of this section occurred within two years of the date of the complaint. A copy of the complaint shall be sent to the health care provider charged promptly upon receipt by the director. The director may establish an advisory panel of health care providers consisting of three members, one selected by the complainant, another selected by the health care provider charged, and the third selected by the director who shall assist the director in any case arising under this section. Fees for services rendered by members of the advisory panel shall be paid for by the special compensation fund. No member of the advisory panel shall be liable in damages for libel, slander, or other defamation of character of any party for any action taken while acting within their capacities as members of the advisory panel.

The director shall issue, where a sanction is ordered under this section, a written decision of findings following a hearing held upon not less than twenty days written notice to the complainant and the health care provider charged. No violation shall be found unless the director determines that the violator acted in bad faith. Any person

aggrieved by a decision of the director may appeal the decision under section 386-87.

(e) In any case arising under this section, the injured employee treated by the health care provider charged with a violation of this section shall not be a party to the proceedings and shall not appear unless called as a witness before the director or the appellate board. Charges for services rendered by the health care provider alleged to be in violation of this section shall be suspended pending action by the director and the appellate board in cases on appeal.

In any case in which fees for services rendered by a health care provider are disallowed by the director, the health care provider shall be ordered to forfeit payment. [Emphasis added].

E. Hawaii Administrative Rules Relating To Advisory Panel

§12-13-1 Definitions. As used in this chapter:

"Advisory panel" means the advisory panel of health care providers appointed by the director pursuant to section 386-27, HRS.

. . . . . .

. . . . . .

§12-13-20 Advisory panel of health care providers. (a) When the director determines an advisory panel is necessary, the director shall notify the complainant and the health care provider of concern. The complainant and the health care provider of concern shall submit the names of

their preferred advisory panelist and two alternates to the director.

(b) If any party fails to submit names within the time allowed by the director, the director may select on behalf of that party, a person to fill that party's panelist's position. The director shall then notify the advisory panel of the panelist's name, the date of review, and the facts of the case.

(c) If any panelist considers the nature of the case to be within the panelist's scope and field of expertise, and does not represent a conflict of interest, the panelist shall notify the director of the panelist's availability. If any panelist is unable to attend the review for any reason, the director shall notify the next alternate.

(d) The director shall select a health care provider in the relevant specialty area to represent the director on the advisory panel for the complaint reviewed. The health care provider shall be available to the department for consultation, or panel review, or both.

(e) The advisory panel shall be chaired by the health care provider appointed by the director and may meet with the director as deemed necessary to review the complaint. [Eff 11/29/85] (Auth: HRS §§386-27, 386-72) (Imp: HRS §386-27) [Emphasis added].

§12-13-21 Advisory panel function. (a) The advisory panel shall have the right to request or subpoena through the director relevant information, such as x-rays and chart notes on each case. The health care provider against whom the complaint has been filed shall be notified of the health

care provider's right to appear before the advisory panel at a specified time and place for a review of the complaint.

(b) After the review, the advisory panel shall recommend to the director disposition of the case.

(c) Should the health care provider of concern fail or decline to appear, the advisory panel shall recommend to the director appropriate action based on the available evidence.

(d) After receipt of the recommendation of the advisory panel, the director shall hold a hearing pursuant to section 386-86, HRS. [Eff 11/29/85] (Auth: HRS §§386-27, 386-72) (Imp: HRS §§386-27, 386-71, 371-6) [Emphasis added].

§12-13-22 Advisory panel fees. Each advisory panelist shall be paid from the special compensation fund at a rate of $200 for each complaint reviewed. [Eff 11/29/85] Auth: HRS §§386-27, 386-72) (Imp: HRS §386-27)

. . .

§12-13-31 Who may provide services. (a) All health care providers deemed qualified by the director may provide services to an injured employee. Treatment shall fall within the scope of the health care provider's license to practice.

. . .

F. Hawaii Statutes Defining The Scope Of A Physician's Practice, And The Practices OF Those He May Employ

In Hawaii, the practice of medicine is defined by HRS §453-1 as follows:

> "For the purposes of this chapter the practice of medicine includes the use of drugs and medicines, water, electricity, hypnotism, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject; provided that when a duly licensed physician pronounces a person affected with any disease hopeless and beyond recovery and gives a written certificate to that effect to the person affected or the person's attendant nothing herein shall forbid any person from giving or furnishing any remedial agent or measure when so requested by or on behalf of the affected person." Emphasis added.

Also, in Hawaii, physical therapy is defined by HRS §461J-1 as follows:

"'Physical therapist' means a person who is licensed to practice physical therapy in this State.

'Physical therapy' or 'physical therapy services' means the examination, treatment, and instruction of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction, pain from injury, disease, and any other physical or mental condition as performed by a physical therapist appropriately licensed under this chapter. It includes but is not limited to: (1) Administration, evaluation, modification of treatment, and instruction involving the use of physical measures, activities, and devices, for preventive and therapeutic

purposes, provided that should the care or treatment given by a physical therapist contravene treatment diagnosed or prescribed by a medical doctor, osteopath, or as determined by the board, the physical therapist shall confer with the professional regarding the manner or course of treatment in conflict and take appropriate action in the best interest of the patient; and (2) The provision of consultative, educational, and other advisory services for the purpose of reducing the incidence and severity of physical disability, bodily malfunction, or pain". Emphasis Added.

'Practice of physical therapy' includes, but is not limited to, the use of the following: (1) Physical agents, such as heat, cold, water, air, sound, compression, light, electricity, and electromagnetic radiation; (2) Exercise with or without devices, joint mobilization, mechanical stimulation; biofeedback; postural drainage; traction; positioning, massage, splinting, training in locomotion, and other functional activities with or without assisting devices; and correction of posture, body mechanics, and gait; (3) Tests and measurements of: muscle strength, force, endurance, and tone; joint motion, mobility, and stability; reflexes and automatic reaction; movement skill and accuracy; sensation and perception; peripheral nerve integrity; locomotor skill, stability, and endurance; activities of daily living; cardiac, pulmonary, and vascular functions; the fit, function, and comfort of prosthetic, orthotic, and other assisting devices; posture and body mechanics; limb strength, circumference, and volume; thoracic excursion and breathing patterns; vital signs; nature and locus of pain and conditions under which pain varies; photosensitivity; and the home and work physical environments." Emphasis added.

The scope of license for Hawaii massage therapy is defined by HRS §452-1 as follows:

"'Massage', 'massage therapy', and 'Hawaiian massage' commonly known as lomilomi, means any method of treatment of the superficial soft parts of the body, consisting of rubbing, stroking, tapotement, pressing, shaking, or kneading with the hands, feet, elbow, or arms, and whether or not aided by any mechanical or electrical apparatus, appliances, or supplementary aids such as rubbing alcohol, liniments, antiseptics, oils, powder, creams, lotions, ointments, or other similar reparations commonly used in this practice. Any mechanical or electrical apparatus used as described in this chapter shall be approved by the United States Food and Drug Administration.

- - -

- - -

- - -

'Massage therapist' means any person who engages in the occupation or practice of massage for compensation."

(2)

No. 04-355

IN THE SUPREME COURT OF THE UNITED STATES

EMERSON M.F., JOU, M.D.

PETITIONER

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS E.W. O'CONNOR
KELVIN H. KANESHIRO
ELMIRA K.L. TSANG
REINWALD O'CONNOR & PLAYDON LLP
A LIMITED LIABILITY LAW PARTNERSHIP
24th Floor, Makai Tower
733 Bishop Street
Honolulu, Hawaii 96813
Phone: (808) 524-8350
Facsimile: (808) 531-8628

Attorneys for Respondent
FIRST INSURANCE COMPANY OF HAWAII, LTD.

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction to review the decisions of the Supreme Court of Hawaii, the Hawaii Intermediate Court of Appeals, the Hawaii Labor and Industrial Relations Appeals Board and the Director of the Hawaii Department of Labor and Industrial Relations ("Director")?

II. Whether the State of Hawaii's appointment of an allegedly biased advisory panel member, and the Hawaii State Judiciary's affirmation of the same, deprived Petitioner EMERSON M.F., JOU, M.D. ("DR. JOU") of due process under the Fifth and Fourteenth Amendments, where nothing in the record indicates recommendations of the advisory panel were relied upon by the Director or the appellate board?

III. Whether Hawaii State agencies and the Hawaii State Judiciary committed a regulatory taking by prohibiting DR. JOU from charging patients, under Hawaii's worker's compensation statutes, for physical therapy provided by staff not licensed to provide such services?

IV. Whether Hawaii State agencies and Hawaii's Intermediate Court of Appeals treated DR. JOU differently than other physicians employing third-parties to provide services incident to medical treatment, when they barred DR. JOU from billing for physical therapy provided through unsupervised staff not licensed to provide physical therapy, and thereby violated DR. JOU's Fourteenth Amendment equal protection rights?

V. Whether the Hawaii State Judiciary violated DR. JOU's due process rights and/or committed a regulatory taking when allegedly biased Hawaii appellate court judges ruled against him and allegedly in the interests of a purportedly stacked Judicial Selection Commission?

TABLE OF CONTENTS

OPINIONS BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED 1

CONCISE STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR DENYING THE PETITION 9

ARGUMENT 10

I. THERE IS NO JURISDICTION FOR THIS COURT TO REVIEW DECISIONS ISSUED BY HAWAII APPELLATE COURTS AND AGENCIES 10

A. DR. JOU's Claims Were Not Properly Presented Below So As To Give This Court Jurisdiction for Review 11

B. The Hawaii Supreme Court Did Not Pass on DR. JOU's Constitutional Claims 13

II. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI FOR QUESTIONS OF STATE LAW 14

III. DR. JOU'S CLAIMS HAVE NO MERIT 16

A. There is No Due Process Right to Unbiased Advisory Panel Members 16

B. DR. JOU Has Not Been Foreclosed From Practicing Physiatry and He Has Not Been Deprived of Liberty or Properly Interests.....19

C. DR. JOU Was Treated Like to Other Physicians Similarly Situated.....21

D. Hawaii's Judicial Selection Commission is Not "Stacked" and Ruling in the Interests of a Minority of the Judicial Selection Commission Would Not Secure Judges' Retention.....22

CONCLUSION..... 23

APPENDIX A - Decision of the Director, Department of Labor and Industrial Relations, filed November 21, 1990

TABLE OF CITED AUTHORITIES

Cases

Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed. 2d 474 (1987).... 11, 14

California v. Holladay, 159 U.S. 415, 16 S.Ct. 53, 40 L.Ed. 202 (1985)..... 2

California v. Rooney, 483 U.S. 307, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987)..... 14

Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995)..... 21

First National Bank v. Estherville, 215 U.S. 34, 30 S.Ct. 1521, 54 L.Ed. 223 (1910)..... 2, 13

Fujimoto v. Au, 95 Haw. 116, 19 P.3d 699 (Haw. 2001)..... 11

Goulding v. Feinglass, 811 F.2d 1099 (7th Cir. 1987)..... 20

Hawaii Roofing Co. v. Felix, 49 Haw. 578, 426 P.2d 298 (1967)..... 12

HOH Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs, 69 Haw. 135, 736 P.2d 1271 (1987)..... 12

Johnson v. California, __ U.S. __, 124 S.Ct. 1833, 158 L. Ed. 2d 696 (2004)..... 10

Lamb Enterprises, Inc. v. Kiroff, 399 F.Supp. 409 (N.D. Ohio 1975)..... 13

Long Grove Country Club Estates, Inc. v. Long Grove, 693 F. Supp. 640 (D. Ill., 1988) 20

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 308, 23 S.Ct. 375, 47 L.Ed. 480 (1903) 11

New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 22 S.Ct. 691, 46 L.Ed. 936 (1902) 1

New York C. R. Co. v. New York, 186 U.S. 269, 22 S.Ct. 916, 46 L.Ed. 1158 (1902) 11

NLRB v. Botany Worsted Mills, 133 F.2d 876 (3rd Cir. 1943) 17, 18

Palazzolo v. Rhode Island, 533 U.S. 606, 638, 121 S.Ct. 2448, 150 L. Ed. 2d 592 (2001) 23

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976) 20

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922) 22

Poka v. Holi, 44 Haw. 483, 357 P.2d 110 (1960) 12

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). 13

Reich v. Freeport, 388 F.Supp. 953 (N.D. Ill. 1974) 10

Seibel v. Kemble, 63 Haw. 516, 631 P.2d 173 (1981) 17

Smith v. Texas, 233 U.S. 630, 34 S.Ct. 681, 58 L. Ed. 1129 (1914) 20

Spies v. Illinois, 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed 80 (1887) 11

Thomas v. American Home Prods., 519 U.S. 913, 117 S.Ct. 282, 136 L. Ed. 2d 201 (1996) 1

United States v. Greene, 698 F.2d 1364 (9th Cir. 1983) 21

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946) 13

Statutes

28 U.S.C. 1257 ..... 10, 13

Other Authorities

Pike and Fischer, Administrati[illegible]v. § 63a.16 18

Rules

United States Supreme Court Rules, Rule 10 ..... 1, 15

OPINIONS BELOW

Respondent FIRST INSURANCE COMPANY OF HAWAII, LTD. ("FICOH") incorporates herein by reference, the opinions and orders cited by Petitioner EMERSON M.F., JOU, M.D. ("DR. JOU" and/or "Petitioner"). Additionally, relevant to this matter is the Decision of the Director, Department of Labor and Industrial Relations, filed November 21, 1990. *See* Appendix A.

BASIS OF JURISDICTION

There is no basis for jurisdiction in this Court. Petitioner has not met requirements necessary to invoke jurisdiction under 28 U.S.C. 1257. Further, Rule 10(b) of the Supreme Court Rules ("SCR") does not grant jurisdiction to this Court, but merely *indicates* the general character of reasons for which the Supreme Court will grant plenary consideration. *Thomas v. American Home Prods.*, 519 U.S. 913, 117 S.Ct. 282, 283, 136 L. Ed. 2d 201 (1996)(emphasis added).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

There are no Constitutional and/or Federal provisions properly before this court because Petitioner raises no Federal questions with merit or substance. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 22 S.Ct. 691, 46 L.Ed. 936 (1902). Issues raised by Petitioner were not passed upon Federal grounds, but were resolved based upon state law if at all adjudicated. *First National Bank v. Estherville,* 215 U.S.

341, 30 S.Ct. 15254 L.Ed. 223, (1910); *California v. Holladay*, 159 U.S. 415, 16 S.Ct. 53, 40 L.Ed. 202 (1985).

CONCISE STATEMENT OF THE CASE

This case arises from a Complaint (Record on Appeal filed in the Hawaii Supreme Court on February 25, 2002 ["RA"] at 1-175) filed on March 5, 1990 in the Disability Compensation Division ("DCD") of the State of Hawaii Department of Labor and Industrial Relations ("DLIR") by Respondent FICOH against Petitioner DR. JOU. FICOH was the workers' compensation insurance carrier for Pao Watanabe's employer, Greeters of Hawaii, Ltd. FICOH challenged certain charges for medical treatment rendered by DR. JOU to Ms. Watanabe for work related injuries. FICOH then filed an Amended Complaint on August 21, 1990, also charging that DR. JOU rendered physical therapy to Ms. Watanabe through therapists who were not properly licensed to render physical therapy, and improperly billed FICOH in bad faith with erroneous representations that treatment was performed by duly licensed therapists (RA 248-251).

The Director of the DLIR appointed an advisory committee of physicians. DR. JOU objected to the appointment of Dr. Calvin C.M. Kam ("Dr. Kam"), stating merely that "We could not get a fair hearing from him" (RA 218). No Constitutional clause or Federal issue was raised as a part of DR. JOU's objection to Dr. Kam's appointment. DR. JOU also failed to make any objections based upon Federal takings or equal protection during this administrative tribunal.

On November 21, 1990, the Director of DLIR issued its Findings of Fact and Decision ("1990 Decision") (RA

419-423). The 1990 Decision indicated that the medical advisory panel "did not address issues relative to billings, reporting requirements and other technical allegations which do not require medical expertise. The panel recommended a sanction no more severe than a reprimand." (RA 419-420).

In the 1990 Decision, the Director found as follows:

> Dr. Jou knowingly and improperly used codes 97418 and 97419 which are reserved for services provided by registered physical therapist. Dr. Jou is entitled to billing for massage treatments provided by licensed masseurs, ultrasound, cold and hot pack and therapeutic exercises provided by registered physical therapists and services provided by physician assistants properly supervised. Masseurs, physical therapists and physician assistants must be licensed under Hawaii law. Dr. Jou shall be entitled to billings for services provided by licensed masseurs, registered physical therapists and physician assistants properly supervised, provided in combination, computed using codes 97418 or 97200, and 97419 and/or 97201, properly adjusted in accordance with administrative rule Section 12-13-45.
>
> * * * *
>
> Billing for services provided by licensed or unlicensed physician assistants properly supervised would be adjusted 60% and 50% respectively. Billings for massage treatments provided by unlicensed masseurs or physical therapy treatments provided by unlicensed physical therapists are not allowed.

(RA 422-423)(emphasis in original). The Director did not address any Federal due process, takings, equal protection or

Constitutional claims.

On November 28, 1990, DR. JOU filed a Notice of Appeal regarding the 1990 Decision (RA 428-429). On April 2, 1991, the Labor and Industrial Relations Appeals Board ("LIRAB") issued an Order remanding the matter to the Director of the DLIR to determine all billings that were not authorized or allowed by the Workers' Compensation Medical Fee Schedule, the correct amount that should have been billed by DR. JOU, and the amount of reimbursement due to FICOH (RA 546-547).

On October 4, 1991, a hearing was held to address the issues delineated in the Order of Temporary Remand (RA 812-814, 817). On October 30, 1991, the Director of DLIR filed a Supplemental to Decision dated November 21, 1990 ("1991 Supplemental Decision") (RA 816-818). According to the 1991 Supplemental Decision, FICOH requested reimbursement of $13,493.56 based on its records and an audit conducted by Accumed (RA 817). DR. JOU, through his counsel Mark Thomason, Esq., argued that the Accumed audit should be disallowed and requested time in which to respond. *Id.* Although Mr. Thomason was granted until October 15, 1991 in which to file his response, no response was filed. *Id.*

The Director, through the hearing officer, therefore reviewed the entire record and determined that "Dr. Jou will be allowed fees of $2,241.93 for services provided Pao Watanabe during the period August 31, 1987 through July 27, 1990, resulting in a reimbursable amount of $16,950.61 (payments made of $19,192.54 less $2,241.93)." *Id.* The stated figures are reflected in the hearing officer's calculations as shown in his worksheets (RA at "Others" document 5 Emerson Jou (Pao Watanabe); Complainant's

Exhibit 6 of Complainant's First Amended Exhibit List dated August 8, 2001).

On November 4, 1991, DR. JOU filed a second Notice of Appeal to the LIRAB (RA 819-820). Although a number of settlement and pretrial conferences were noticed since December, 1991, the appeal did not proceed to a trial *de novo* before the LIRAB until August 8, 2001. DR. JOU filed his Post-Trial Brief on September 10, 2001, including arguments that the DLIR Director's empanelment of Dr. Kam on the advisory panel constituted a due process violation (without reference to State or Federal Constitutions), and that the DLIR Director and Appeal Board's admission of FICOH's Accumed audit violated the Fifth and Fourteenth Amendments of the United States and Hawaii Constitutions because DR. JOU was not given the opportunity to examine its author (RA 1172-1176, 1170-1187, 1188-1223).

On December 17, 2001, the LIRAB issued its Decision and Order affirming the 1990 Decision and the 1991 Supplemental Decision (RA 1235-1253). The LIRAB concluded, based solely on Hawaii Revised Statutes and Hawaii Administrative Rules, that the advisory panel was properly convened. The LIRAB also found that the Director's calculations in the 1991 Supplemental Decision were not based on the Accumed report, and that the Director properly disallowed billings performed by those who were not properly licensed. The LIRAB did not pass on issues of due process or the Fifth and Fourteenth Amendments (RA 1249, 1251).

DR. JOU filed his Notice of Appeal to the Supreme Court and the Intermediate Court of Appeals ("ICA") of the State of Hawaii on December 27, 2001 (RA 1255-1276). In his Opening Brief filed May 6, 20[illegible]2 ("OB"), DR. JOU

argued that (1) the LIRAB and the DLIR Director's decision to empanel Dr. Kam on the advisory panel constitutes not only a due process violation, but an equal protection violation as well, and (2) the DLIR and LIRAB's use of Hawaii Administrative Rules in conflict with Hawaii Revised Statutes constituted a taking (OB 2-3, 15, 18, 29-30).

The ICA issued a Summary Disposition Order May 7, 2004, stating in relevant part:

> Specifically, Dr. Jou contends, "At least one decisionmaker relied on by the agency (Dr. Calvin [C.M.] Kam [(Dr. Kam)]), was personally and financially interested in his decision against [Dr. Jou], in violation of Article 1, Section 5 of the Constitution of the State of Hawaii, and the Fifth and Fourteenth Amendments to The United States Constitution ." Opening Brief at 2 (citation to appendix omitted). This argument is unavailing. Dr. Jou's appeal to the Appellate Board was a *de novo* proceeding...and nothing in the record indicates the Appellate Board relied upon the recommendations the advisory panel made to the Director.
>
> * * * *
>
> Dr. Jou also contends that the relevant provision of the [Hawaii Administrative Rule's Medical Fee Schedule] work a taking of his property without due process of law, "in violation of the Fifth Amendment of the U.S. Constitution and Article 1, Section 5 of the Hawaii Constitution[.]" Opening Brief at 27 (capitalization modified). Dr. Jou makes no detectable argument in support of this assertion, and thus fails his burden on appeal to prove the administrative provisions unconstitutional beyond a

reasonable doubt, and show the constitutional defect clearly, manifestly, and unmistakably.

See Summary Disposition Order May 7, 2004. It should be noted that the ICA's opinion made no reference to Federal laws beyond quotation of DR. JOU's claims, and discrediting the same based upon the laws of the State of Hawaii. *Id.*

On June 1, 2004, DR. JOU filed an Application for Writ of Certiorari in the Hawaii Supreme Court ("AWC"). Questions presented for review include the following:

A. Whether the State's conduct, approved by the ICA, penalizing the physician's practice and requiring additional licensure as a physical therapist is a regulatory taking, violating the Fifth and Fourteenth Amendments to The United States Constitution, and Article I Sections 4 and 5 of the Hawaii Constitution?
B. Whether the ICA authorized the State, by its agency (LAB), to deprive Petitioner property without due process of law by permitting the use of a review board panelist who received payment prior to the proceedings for an IME on the same case?
E. Whether the ICA-approved conduct by the agency limiting the physician's scope of practice, and limiting the use of employees and products incident to the physician's services, constituted rule-making without due process, in violation of the 14th Amendment to The United States Constitution, and Article I Sections 4 and 5 of the Hawaii State Constitution?
F. Whether the ICA's endorsement of the agency's conduct restricting the property rights of

> Petitioner violated Petitioner's rights to equal protection under the Fourteenth Amendment to The United States Constitution?[...]and whether the ICA's decision singled Petitioner out for treatment disparate from other physicians who employ licensed non physicians incident to their services?

(AWC 1-2). The Hawaii Supreme Court denied DR. JOU's Application on June 10, 2004. *See* Order Denying Application for Writ of Certiorari filed June 10, 2004.

DR. JOU now seeks review by yet another appellate court, again alleging that constitutional violations occurred because the last court did not rule in his favor. DR. JOU asks this Court to find the following:

1. The State of Hawaii's appointment of an allegedly biased advisory panel member, and the Hawaii State Judiciary's affirmation of the same, deprived DR. JOU of due process under the Fifth and Fourteenth Amendments, where nothing in the record indicates recommendations of the advisory panel were relied upon by the appellate board.
2. Hawaii State agencies and the Hawaii State Judiciary committed a regulatory taking by prohibiting DR. JOU from charging patients, under Hawaii's worker's compensation statutes, for physical therapy provided by staff not licensed to provide such services.
3. Hawaii State agencies and the ICA treated DR. JOU differently than other physicians employing third-parties to provide services incident to medical treatment, when they barred DR. JOU from billing for physical therapy provided through

unsupervised staff not licensed to provide physical therapy, thereby violating DR. JOU's Fourteenth Amendment equal protection rights.

4. The Hawaii State Judiciary violated DR. JOU's due process rights and/or committed a regulatory taking when biased Hawaii appellate court judges ruled against him and allegedly in the interest of a purportedly stacked Judicial Selection Commission.

SUMMARY OF REASONS FOR DENYING THE PETITION

This Court has no jurisdiction to review decisions of the Hawaii State courts and agencies below. Failing to meet the jurisdictional requirements of 28 U.S.C. 1257(a), DR. JOU did not properly raise Constitutional issues below, nor did Hawaii's courts pass upon any Constitutional questions. Even assuming DR. JOU met jurisdictional requirements, there is no compelling reason for the court to grant review as the state courts have not decided any questions of Federal law. Finally, DR. JOU's claims are substantively devoid of merit.

ARGUMENT

I. THERE IS NO JURISDICTION FOR THIS COURT TO REVIEW DECISIONS ISSUED BY HAWAII APPELLATE COURTS AND AGENCIES

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. 1257(a) (emphasis added). Federal courts are courts of limited jurisdiction empowered to hear only those cases which have been entrusted to them by Congressional grant of jurisdiction, and they have no power to review judgment of state courts, except where a substantial Federal question is involved. *Reich v. Freeport*, 388 F.Supp. 953 (N.D. Ill. 1974), *aff'd on other grounds,* 527 F.2d 666 (7th Cir. 1975). Under 28 U.S.C. 1257, jurisdiction is further limited to review of final judgments or decrees rendered by the highest court of a State in which a decision could be had. *Johnson v. California*, __ U.S. __, 124 S.Ct. 1833, 1834, 158 L. Ed. 2d 696 (2004).

A. DR. JOU's Claims Were Not Properly Presented Below So As To Give This Court Jurisdiction for Review

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the Federal claim was adequately presented in the state system." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 95 L.Ed. 2d 474 (1987).

The proper time to assert Federal questions so as to give the United States Supreme Court jurisdiction on writ of error to state court, is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 47 L.Ed. 480 (1903). The Federal question relied upon to confer jurisdiction on Supreme Court cannot first be raised in Supreme Court of United States. *Spies v. Illinois,* 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed 80 (1887).

The proper way to assert a Federal question is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *McGrew*, 188 U.S. at 308. A clause of the Constitution or law of Congress must have been specified. *New York C. R. Co. v. New York,* 186 U.S. 269, 22 S.Ct. 916, 46 L.Ed. 1158 (1902).

DR. JOU did not properly raise any of his claims so as to invoke the jurisdiction of the United States Supreme Court. Generally, claims regarding constitutional violations are properly raised before the trial court. *Fujimoto v. Au,* 95 Haw. 116, 19 P.3d 699 (Haw. 2001). The proper time to

raise claims for due process violations associated with bias of judges is at the trial court level. *Poka v. Holi*, 44 Haw. 483, 357 P.2d 110 (1960); *Hawaii Roofing Co. v. Felix*, 49 Haw. 578, 426 P.2d 298 (1967). Similarly, the suggestion of an advisory panel member's bias must be made on the record at the administrative hearing. *HOH Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs*, 69 Haw. 135, 141, 736 P.2d 1271, 1274 (1987).

With respect to DR. JOU's claims of impartiality on the part of Dr. Kam and consequential due process violations, such claims arose at the time of the DLIR hearings. However, charges alleging a constitutional violation were first made on appeal to the LIRAB (RA 1173), after the DLIR hearings had concluded. As well, DR. JOU alleged that Hawaii appellate court judges were biased and due process rights were violated, only after their rulings had been issued and only on appeal thereto. *See* Petition for Writ of Certiorari at p. 20-22.

Review of administrative decisions is confined to issues properly raised in the record of the administrative proceeding. *HOH Corp.*, 69 Haw. at 141, 736 P.2d at 1274. DR. JOU's prohibition from billing for services provided by unlicensed staff was first pronounced in the decision issued by the DLIR Director (RA 419-423). The prohibition was not alleged to be a regulatory taking until appeal to the ICA (OB 15). Similarly, DR. JOU neglected to raise his equal protection allegations related to disparate treatment by the DLIR, during proceedings before the DLIR. In fact, the argument was not made until DR. JOU's application for Writ of Certiorari to the Hawaii Supreme Court (AWC 2). Because DR. JOU was required to raise his regulatory taking and equal protection claims during the DLIR proceedings, but failed to do so until the appeal, this Court is unable to review the same on writ of error.

B. The Hawaii Supreme Court Did Not Pass on DR. JOU's Constitutional Claims

For the Supreme Court to review a decision of a state court, it must appear affirmatively from record not only that a Federal question was presented to highest court of state having jurisdiction but that its decision of the Federal question was necessary for determination of case. *Wilson v. Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946). It is not enough to give the United States Supreme Court jurisdiction over judgment of a state court for the record to show that a Federal question was argued or presented to that court for decision; it must appear that decision of the Federal question was necessary to the determination of cause and that it was actually decided, or that judgment, as rendered, could not have been given without deciding it. *First National Bank v. Estherville,* 215 U.S. 341, 54 L.Ed. 223, 30 S.Ct. 152 (1910).

Accordingly, the U.S. Supreme Court has no jurisdiction to review a state decision resting on adequate and independent non-Federal grounds; the decision will not be reviewed even though the state court may have also summoned to its support erroneous views of Federal law. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). Where a decision might have been rendered on either Federal ground or state ground, the Supreme Court will not review the Federal ground on appeal as of right under 28 U.S.C. § 1257 unless the state ground is too insubstantial or insufficient to justify the result below. *Lamb Enterprises, Inc. v. Kiroff*, 399 F.Supp. 409 (N.D. Ohio 1975), *revd on other grounds* 549 F.2d 1052 (6th Cir. 1977), *cert. denied* 431 U.S. 968, 97 S.Ct. 2926, 53 L.Ed. 2d 1064 (1977).

Jurisdiction in this matter is deficient because the Hawaii Supreme Court did not pass on DR. JOU's constitutional questions, based upon Federal grounds or otherwise. When an issue has not been the subject of judgment from the highest state court, review by the U.S. Supreme Court would be premature and the writ of certiorari should be dismissed. *California v. Rooney*, 483 U.S. 307, 313, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987). When the highest state court fails to pass upon a Federal question, such as the case when the highest state court denies review without opinion, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 95 L. Ed. 2d 474 (1987).

The Hawaii Supreme Court denied DR. JOU's Application for Writ of Certiorari without issuing an opinion on June 10, 2004. No Federal questions were passed upon on Federal grounds. *See* Order Denying Application for Writ of Certiorari filed June 10, 2004. Even if this Court could review the ICA's written opinion, Constitutional issues therein were dismissed as insubstantial and the LIRAB's decision was validated on state law grounds. *See* Summary Disposition Order May 7, 2004. Thus, there is no final judgment rendered by the highest court of the State of Hawaii for this Court to review.

II. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI FOR QUESTIONS OF STATE LAW

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of

certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important Federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important Federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of Federal law that has not been, but should be, settled by this Court, or has decided an important Federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SCR Rule 10 (emphasis added). Guided by SCR Rule 10, it is clear that the issues raised by DR. JOU's Petition for Writ of Certiorari are not of the character necessary for United States Supreme Court review.

It is equally clear that the DLIR, LIRAB, ICA and Hawaii Supreme Court did not decide any question of Federal law. Rather, all issues addressed were resolved based on Hawaii State law. DR. JOU also asserts only that constitutionally valid Hawaii State laws were erroneously applied.

III. DR. JOU'S CLAIMS HAVE NO MERIT

Examining DR. JOU's individual contentions, there is no basis in law or fact for a ruling in his favor. Substantively, DR. JOU's claims have no merit.

A. There is No Due Process Right to Unbiased Advisory Panel Members

DR. JOU argues that a due process violation resulted when Dr. Kam was allowed to serve on the advisory panel to the hearing conducted by the Director of the DLIR. In support of this proposition, DR. JOU first argues that errors regarding the legitimacy of judges and jurors are structural, and therefore prejudice need not be proved. Assuming this principle is true, it is nonetheless inapplicable to the facts of our case. Dr. Kam was neither an adjudicator nor fact finder. Dr. Kam was merely one of three advisory panel members whose report the adjudicator and fact finder were at liberty to consider or ignore.

DR. JOU next argues that special masters are subject to the same standards as judges, therefore advisory panel members should be held to the same standard as adjudicators. DR. JOU, however, cites no authorities that analogize or compare advisory panel members to special masters, but

merely reasons that because they are both subject to the control of an adjudicator, they should be held to the same standard as the adjudicator. There is no weight to this contention.

Finally, DR. JOU maintains, citing *Seibel v. Kemble,* 63 Haw. 516, 631 P.2d 173 (1981), that since court-appointed psychiatrists enjoy judicial immunity like advisory panel members, the standards applicable to judges applies equally to advisory panel members. DR. JOU's logic is seriously flawed because the cloak of judicial immunity does not transform a court-appointed psychiatrist into an adjudicator. Therefore, the bias of an advisory panel is not to be judged in the same manner as that of an adjudicator.

Instead, the proper standard applicable to evaluations of alieged biases in the context of administrative hearings and advisory personnel is found in the *NLRB v. Botany Worsted Mills,* 133 F.2d 876 (3rd Cir. 1943). There, a complaint was made against an employer for unfair labor practices. It was alleged that the employer's due process right were violated because the National Labor Relations Board's trial examiner was previously employed by the NLRB and thereby biased.

> The trend of the [employer's] whole argument presses too hard the analogy between trial examiner and Board and trial court and appellate court. It is the Board, not the trial examiner, which is charged by the Act with both the power and responsibility of making findings of fact and the decisions thereon. The trial examiner [...] makes findings and recommendations presented to the Board as an intermediate report. Unlike judges, trial examiners may be substituted at the will of the Board during the course of either representation or complaint proceedings. In both the

> representation and complaint proceedings all the pleadings, notices, rulings, orders, stenographic records, exhibits, documents and depositions constitute the record before the Board. The trial examiner's intermediate report is merely advisory and the Board may accept or reject it. Indeed, the latest commentators upon the subject have said that the report of the trial examiner "is to be regarded as in the nature of an 'inter-office memorandum,' whose presence or absence does not or should not affect the result of the case being determined by the agency tribunal." Pike and Fischer, Administrative Law, § 63a.16. It is the Board, therefore, which has the final responsibility both under the terms of the statute and the decisions of the courts construing and applying it. [...] If bias is charged against it or one of its members, a different problem arises and this court has, in the past, taken action it deemed appropriate under the circumstances.

Botany Worsted Mills, 133 F.2d at 882-883.

As in *Botany Worsted Mills,* our case presents an advisory report that was provided as an intermediate report to the decision maker. Dr. Kam was an advisory panel member; one of three members. He drafted a report which the DLIR Director was at liberty to use or disregard. Final responsibility for the decision rested with the Director and not Dr. Kam. As noted by the ICA's Summary disposition order, "the appeal to the [LIRAB] was a *de novo* proceeding...and nothing in the record indicated that [LIRAB] relied upon the recommendations the advisory panel made to the Director [below]." *See* Summary Disposition Order May 7, 2004, p.2.

DR. JOU has made no showing that Dr. Kam participation on the advisory panel resulted in a due process violation. Indeed, he cannot because the Director did not adopt Dr. Kam's more lenient recommendation.

B. DR. JOU Has Not Been Foreclosed From Practicing Physiatry and He Has Not Been Deprived of Liberty or Properly Interests

DR. JOU's takings claim rests on the argument that the decisions below "forces licensed physicians to employ physical therapists licensed in Hawaii as a condition to providing some of the medical services listed in the state's medical fee schedule." DR. JOU misperceives and mischaracterizes the decisions below.

The DLIR Director's decision did not prohibit DR. JOU from providing physical therapy unless a licensed physical therapist was employed. Instead, DR. JOU was only prohibited from charging for physical therapy services pursuant to Hawaii's workers' compensation statutes, and only where such services were performed by unlicensed staff without supervision. The Director's decision has not restricted DR. JOU's ability to provide physical therapy outside of Hawaii's workers' compensation statutes. The Director's decision also permits DR. JOU to receive payment for physical therapy he himself provides or directly supervises, pursuant to Hawaii's workers' compensation scheme. Therefore, the issue is whether DR. JOU was deprived of a property interest when the State prohibited him from charging patients for physical therapy services where such services were provided by an unsupervised and unlicensed staff member, in violation of Hawaii's workers' compensation statutes.

Liberty includes the right "to work for a living in the common occupations of the community." *Long Grove Country Club Estates, Inc. v. Long Grove*, 693 F. Supp. 640, 662 (D. Ill., 1988). But it is well established that in the exercise of police power, the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. *Smith v. Texas*, 233 U.S. 630, 638, 34 S.Ct. 681, 58 L. Ed. 1129 (1914). The Supreme Court has held that even the loss of one's job does not amount to a deprivation of liberty, as long as the plaintiff remains free to locate alternate employment. *Long Grove*, 693 F. Supp. at 662.

The Supreme Court in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976) makes clear that to find the deprivation of a property interest in an alleged deprivation of right to practice one's profession, an individual's legal rights or status must have been removed or significantly altered. *Goulding v. Feinglass*, 811 F.2d 1099, 1102 (7th Cir. 1987). There is no deprivation of a property right to work where such individual has not lost the right to practice his profession, his license to practice has not been revoked or suspended, and he is still currently practicing. *Id.* at 1103. In essence, no liberty interest is impaired where an individual is not foreclosed by a legal barrier from practicing his profession.

Despite his extreme assertions, DR. JOU has not been prohibited from providing physical therapy services, nor has he lost the right to practice physiatry, with or with a licensed therapist. He maintains the right to practice any physical therapy that <u>he himself</u> performs as a part of physiatry treatment. DR. JOU's license to practice physiatry has not been revoked, and DR. JOU is currently practicing physiatry. DR. JOU therefore has not been subject to a liberty or property infringements.

C. DR. JOU Was Treated Like to Other Physicians Similarly Situated

DR. JOU next argues that the courts and agencies below treated him differently from similarly situated physicians who provide services through employees incident to treatment.

There is a category of equal protection claims in which government officials prosecute individuals for vindictive or otherwise illegitimate reasons. *Esmail v. Macrane*, 53 F.3d 176, 178-80 (7th Cir. 1995). "To succeed on a claim of selective prosecution, the defendant has a two-part burden. He must establish both that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution . . . was based on an impermissible motive." *United States v. Greene*, 698 F.2d 1364, 1368 (9th Cir. 1983).

DR. JOU has failed to make an adequate showing of either prong of the test enumerated in *Greene*. DR. JOU offers no evidence that other physicians have charged patients under Hawaii's workers' compensation scheme for unsupervised physical therapy services conducted by unlicensed employees (or those similarly situated), without being prosecuted for such conduct. Far short of providing evidence, DR. JOU has not even suggested an improper motive for the alleged discriminatory prosecution. There is not a scintilla of evidence to support DR. JOU's equal protection claim.

D. Hawaii's Judicial Selection Commission is Not "Stacked" and Ruling in the Interests of a Minority of the Judicial Selection Commission Would Not Secure Judges' Retention

DR. JOU alleges that the State of Hawaii committed a regulatory taking of property rights to practice his profession, subject to *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 396-398, 43 S.Ct. 158 (1922), when the ICA formulated its decision in favor of FICOH. DR. JOU alludes to improper rulings by ICA judges, for the purposes of furthering their retention by appeasing three members of Judicial Selection Commission who allegedly have strong ties to Hawaii's health and property casualty insurers. Although his argument is unclear and disjointed, DR. JOU may also be implicating the State's composition of the Judicial Selection Commission itself.

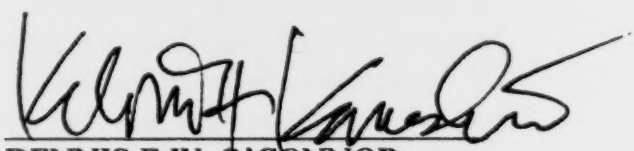
Petitioner's allegations regarding ICA judges and the Judicial Selection Commission are based upon speculation and conjecture. The Judicial Selection Commission is comprised of nine members. Two are elected by the Hawaii Bar Association; Two are elected by the Governor; Two are elected by the Senate President; Two are elected by the House of Representative Speaker; and, One is selected by the Chief Justice. It is ridiculous for Petitioner to allude to a "packing" of Hawaii's Judicial Selection Commission, where only three of nine Commission members are alleged to "earn all or a substantial amount of income from the state health and property casualty insurers." Even if the three members did have affiliations with insurance carriers as alleged by Petitioner, three out of nine members could hardly be considered "packing" or "filling" the Commission with members having an interest in insurance carriers. It is even more outrageous for Petitioner to allude that judges sitting on

the intermediate court of appeals would write an opinion in favor of insurance carriers, merely to appease three of nine Commission members, and thus be able to somehow secure their retention.

Petitioner also fails to show that a taking occurred. A taking is a governmental acquisition of private property for which the state is required to provide just compensation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 638, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). As discussed above, Plaintiff cannot identify any personal property that that was taken from him. As stated above, the ICA did prohibit DR. JOU from practicing his profession by revoking his license or otherwise. There simply was no taking.

CONCLUSION

For the foregoing reasons, Respondent FIRST INSURANCE COMPANY OF HAWAII, LTD. respectfully requests that DR. JOU's Petition for Writ of Certiorari be denied.



DENNIS E.W. O'CONNOR
KELVIN H. KANESHIRO
ELMIRA K.L. TSANG

Attorneys for Respondent
FIRST INSURANCE COMPANY
OF HAWAII, LTD.

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
830 PUNCHBOWL STREET
P. 0. BOX 3769
HONOLULU. HAWAII 96812-3769

CASE NUMBER: C9001
COMPLAINT DATE: March 5, 1990

EMERSON H. F. JOU, M.D., M.P.H.
Comprehensive Clinic of Rehabilitation Medicine
Kuakini Medical Plaza
321 N. Kuakini Street, Suite 410
Honolulu, Hawaii 95817

MARK R. THOMASON, ESQ.
820 Mililani Street, Suite 615
Honolulu, Hawaii 96813

FIRST INSURANCE CO. OF HAWAII, LTD.
P.0. Box 2866
Honolulu, Hawaii 96803

LEROY T. KUWASAKI, JR., ESQ.
550 Halekauwila Street, Suite 105
Honolulu, Hawaii 96813

ATTN: DEPUTY ATTORNEY GENERAL
WORKERS' COMPENSATION SPECIAL FUND
425 Queen Street, Third Floor
Honolulu, Hawaii 96813

Such investigation of the above-entitled matter having been made as he deems necessary, the Director makes the following

APPENDIX A

FINDINGS OF FACT

On March 5, 1990, First Insurance Company of Hawaii, Ltd., filed a complaint under Section 386-27, HRS, against Emerson M. F. Jou, M.D., M.P.H. alleging violations of Sections 386-27, 386-96, and 453-8, HRS; Sections 12-10-71, 12-13-1, 12-13-13, 12-13-30, 12-13-36, 12-13-38, 12-13-40, 12-13-80, 12-13-91, and 12-13-95 of the Workers' Compensation Administrative Rules, relative to treatments provided to Pao Watanabe (CN: 28711296). By letter dated March 12, 1990, Dr. Jou filed with the director a written statement in response to the complaint. First Insurance Company of Hawaii, Ltd., filed with the director an amended complaint on August 21, 1990. A hearing on the complaint was held on October 3, 1990.

Specifically, the complaint alleges that while treating Pao Watanabe, for an industrial injury to her back on March 11, 1987, Dr. Jou:

1. persistently refused to consider the recommendations made by board certified and qualified health care providers to refer claimant for psychotherapy;

2. provided passive physical treatment no longer required by the nature of the injury;

3. failed to make a diligent effort to secure all available medical information from claimant's previous physicians;

4. failed to comply with the responsibilities of an attending physician;

5. allowed concurrent physical therapy treatments without prescription;

6. allowed unlicensed or unqualified individuals to treat while not directly controlled or supervised by the attending physician;

7. in bad faith submitted misleading billings;

8. refused to treat the injured worker with valid reason;

9. failed to file reports as required by Section 386-96, HRS, Section 12-13-80, and related Administrative Rules;

10. failed to properly annotate reports filed with the Director;

11. charged fees for care of the industrial injury to the injured employee;

12. failed to certify that charges for supplies were required or prescribed for the industrial injury.

Dr. Jou indicated that the patient suffered chronic pain due to muscle strain and not due to psychogenic factors. Dr. Jou indicated that he does not object to psychological intervention and did offer psychological referral to the claimant which was always declined. He also indicated he was granted authorization to provide treatments and the patient responded to the physical therapy treatment. Dr. Jou felt that he obtained sufficient medical information to properly diagnose and treat the patient. He also felt that he provides his staff with proper prescriptions and special instructions, supplemented with frequent verbal and written communication regarding patient responses. Dr. Jou indicated that he submitted properly annotated medical reports and did not bill or demand payment from the patient for care related to the industrial injury.

The employer alleges that Dr. Jou was aware of claimant's psychological problems and had numerous medical opinions from qualified health care providers to include Roy Sam, M.D., Calvin C. M. Kam, M.D., Francy Mateus, M.D., and Vincent Onorato, Ph.D. who indicated the need for psychological evaluation and treatment. Employer also stated that Dr. Jou submitted at least 12 plans to provide

the same type of passive physical therapy treatment at the same frequency for over 2 years without improvement in the patient's condition and which was not required by the nature of the injury. Drs. Sam, in a report dated October 21, 1988, Kam, in reports dated February 3, 1989 and September 4, 1989, and Mateus, in a report dated August 30, 1989, indicated the patient does not require further passive physical therapy treatment. Employer further alleges that in failing to obtain important and relative medical information from other health care providers, Dr. Jou was not aware of the EMG test performed on August 13, 1987 which indicated no signs of radiculopathy and a bone scan performed by the Hickam Dispensary on October 13, 1987 which indicated normal results. Dr. Jou was also not aware of depression treatments provided in 1982 and 1988.

The employer also alleges that Dr. Jou failed to fulfill his responsibilities for treating and overall coordination of services provided by nonphysicians. The employer alleges Dr. Jou failed to file and failed to have nonphysicians file required reports on a timely basis and with proper annotations as required under Section 386-96, HRS, and administrative rule Sections 12-10-71 and 12-13-80. No documentation was kept to measure the patient's progress which would be necessary to determine the efficacy of ongoing care. No written prescriptions or reports from the physician and therapists who provided services were received by the employer. The patient indicated during a deposition that services were performed by unlicensed individuals while not under the direct control and supervision of Dr. Jou. The employer further indicated that Dr. Jou incorrectly billed for services provided by non-licensed individuals. The employer also alleges that Dr. Jou violated administrative rule Section 12-13-l3(a)(11) by billing both the patient and employer for services rendered on 9/10/88 - 10/20/88, 11/9/88 - 11/18/88, and 1/3/8 - 1/6/89. Finally the employer alleges that Dr. Jou failed to certify his prescription for TENS unit on September 21, 1987.

A medical advisory panel, consisting of David Y. Kimura, M.D., Calvin C. M. Kam, M.D., and Bernard M. Portner,

M.D. was convened on July 3, 1990. The panel noted that although Pao Watanabe requires psychiatric treatment, Dr. Jou did offer this referral, which the claimant refused. The panel determined that "ultrasound and massage treatments have been excessive and reached the point of becoming inappropriate and unnecessary long ago." However the panel noted that these treatments were approved by the Department of Labor. Dr. Kam indicated that a responsible health care practitioner would not continue such treatments which result in no health care benefit. The panel felt that obtaining prior health care records is within the discretion and judgment of the physician and in this case may be considered an error in judgment since this information would aid in the assessment and treatment of the patient. The panel felt that "the therapist under Dr. Jou's supervision should be required to do the same recording and reporting as a therapist not associated with the physiatrist." Dr. Kam also noted that Dr. Jou "was not able to provide any further health care data relative to what was done by his staff, the benefits thereof". The panel did not address issues relative to billings, reporting requirements and other technical allegations which do not require medical expertise. The panel recommended a sanction no more severe than a reprimand.

All parties agreed that both parties would be allowed to file final position papers with the department on October 17, 1990. A Supplemental Complaint and Position Statement was submitted by First Insurance Co. of Hawaii on October 17, 1990. No additional statements were filed by Dr. Jou.

Upon review of the entire record, we find that Dr. Jou acted in bad faith and is in violation of provisions of Section 386-27, HRS, and the related rules. The advisory panel of medical experts clearly indicated that Dr. Jou provided ultrasound and massage treatments which were inappropriate and unnecessary. The fact that additional treatments were authorized does not relieve Dr. Jou of his responsibility to provide only treatments as required by the nature of the injury.

We further find that Dr. Jou violated administrative

rule Sections 12-13-13(a)(3), (4), and (8) by allowing unlicensed individuals to provide physical therapy treatments. Dr. Jou knowingly and improperly used codes 97418 and 97419 which are reserved for services provided by registered physical therapist. Dr. Jou is entitled to billings for massage treatments provided by licensed masseurs, ultrasound, cold and hot pack and therapeutic exercises provided by registered physical therapists and services provided by physician assistants properly supervised. Masseurs, physical therapists and physician assistants must be licensed under Hawaii Law. Dr. Jou shall be entitled to billings for services provided by licensed masseurs, registered physical therapists and physician assistants properly supervised, provided in combination, computed using codes 97418 or 97200, and 97419 and/or 97201, properly adjusted in accordance with administrative rule Section 12-13-45. For example, billing for a patient receiving hot and cold packs, ultrasound, therapeutic exercises by a registered physical therapist for 30 minutes and massage by a licensed masseur for 15 minutes, in combination in 1988, would be computed as follows:

97418(PT)	1.0 unit X 23.27	=23.27
97419(PT)	.4 unitsX 23.27	= 9.31
97201(Massage)	.4 unitsX 23.27	= 9.31
		=41.89 = 41.90 X 1.04
		= $43.58

Billing for services provided by licensed or unlicensed physician assistants properly supervised would be adjusted 60% and 50% respectively. Billings for massage treatments provided by unlicensed masseurs or physical therapy treatments provided by unlicensed physical therapists are not allowed. Dr. Jou shall forfeit or reimburse the employer for all billings or payments made in excess of that allowed by the Workers' Compensation Medical Fee Schedule.

In addition, Dr. Jou is fined $7,000.00 payable to the Workers' Compensation Special Compensation Fund, for providing unnecessary treatments, for allowing unlicensed individuals to provide massage and physical therapy, for

failure to provide proper supervision, failure to prepare or have prepared appropriate reports to indicate the nature and efficacy of the treatment provided to Pao Watanabe, failure to submit required reports and repeated submission of inaccurate and misleading bills.

Thereupon the Director makes the following

DECISION

1. Pursuant to Section 386-27, HRS, Emerson M. F. Jou, M.D. shall reimburse said employer for billings for medical care, services and supplies provided to Pao Watanabe relative to her injury on March 11, 1987 (CN: 28711296) not authorized or computed in accordance with the Workers' Compensation Medical Fee Schedule. In accordance with Section 12-13-13(a)(14) of the Workers' Compensation Medical Fee Schedule Administrative Rules, disallowed fees shall not be chargeable to Pao Watanabe.

2. Pursuant to Section 386-27, HRS, Emerson M. F. Jou, M.D. shall be fined $7,000.00, which is immediately payable to the Workers' Compensation Special Compensation Fund.

BY ORDER OF THE DIRECTOR, NOVEMBER 21, 1990.

_____

Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or his county representative within twenty days after a copy of this decision has been sent.